136-242

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 326.

ROBERT HAMILTON, PLAINTIFF IN ERROR,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY OF GREAT BRITAIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED MAY 13, 1887.

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1-20 *Petition.*

Circuit Court of the United States, Southern District of Ohio, Western Division.

ROBERT HAMILTON, Plaintiff,
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE CO., a Corporation Organized under the Laws of Great Britain, Defendant.

Plaintiff, Robert Hamilton, comes and says that he is a citizen and resident of the State of Kentucky, and that the defendant, The Liverpool & London & Globe Insurance Company, is a corporation created under the laws of Great Britain, and is a citizen and resident of the Kingdom of Great Britain. Plaintiff further says that the said defendant, on the 5th day of Sept., 1885, made and executed its policy of insurance and delivered the same to plaintiff, and for the consideration therein expressed, then and there paid by the plaintiff to the defendant, did insure the plaintiff against loss or damage by fire to the amount of five thousand dollars upon the property in said policy described, which said policy of insurance was in the words and figures following, to wit: * * *

21 And the plaintiff further avers that at the time of the making of said policy and from thence until the happening of the loss and damage hereinafter mentioned he, the said plaintiff, was the owner of the said property, and that the same was of the value of $20,484.67.

And the plaintiff further avers that on or about the sixteenth day of April, A. D. 1886, the said property was consumed and partially destroyed by fire, whereby the plaintiff then and there sustained loss and damage on the said property to the amount of ten thousand dollars, which said loss and damage was within the risk insured against by the said policy of insurance.

The plaintiff further says that immediately thereafter, to wit, on or about the 24th day of April, A. D. 1886, he then and there gave notice thereof to the defendant, & then and thereafter delivered to the defendant due proofs of the said loss, as provided by said policy of insurance; and the plaintiff avers that he has done and performed all the conditions in said policy contained on his

22-25 part to be kept and performed, and the plaintiff further alleges that in pursuance of the privilege in said policy contained he, the plaintiff, had other insurance upon said property, amounting, together with the insurance provided by said policy, to the aggregate sum of ten thousand dollars, and the plaintiff, by the terms of said policy of insurance, became and is entitled to recover of the defendant the proportion of the loss so sustained which the sum insured by said defendant's policy bears to the whole amount insured thereon as aforesaid, to wit, the sum of five thousand dollars ($5,000), together with interest from the 6th day of April, A. D. 1886; and the plaintiff avers that the defendant, though often requested, has

not yet paid to the plaintiff that amount or any part thereof, but refuses so to do, to the damage of the plaintiff of $5,000.00.

Wherefore plaintiff prays judgment against the defendant in the sum of five thousand dollars, with interest thereon from the sixteenth day of April, A. D. 1886, and his costs in this behalf expended.

By KITTREDGE & WILBY,
Attorneys for Plaintiff.

* * * * * * *

26 And afterwards, to wit, on the 13th day of August, A. D. 1886, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

Circuit Court of the United States, Southern District of Ohio, Western Division.

ROBERT HAMILTON, Plaintiff,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant. } No. 3901.

27 Defendant admits that it executed and delivered to plaintiff the policy of insurance set forth in the petition, and that at the time of making said policy and from thence until the 16th day of April, 1886, plaintiff was the owner of certain property of the kind therein described, but denies that at the time of the fire mentioned in the petition said property was of the value of $20,484.67, and, having no means of ascertaining the amount and true value thereof, demands proof of same. Defendant further admits that on the 16th day of April, 1886, a fire occurred upon premises adjacent to the warehouse wherein said insured property was contained, and that some of said property was slightly damaged by smoke therefrom, but denies that any part of said property was consumed, or that it was partially destroyed or damaged otherwise than as above stated, and denies that plaintiff sustained loss and damage on said property to the amount of eight thousand dollars or near said sum. Defendant is unable to state the real amount of such loss and damage, and requires proof thereof. Defendant further denies that plaintiff has done and performed all the conditions in said policy contained on his part to be kept and performed.

28 Second defense.

And defendant, further answering, says that the policy of insurance sued on herein was executed by defendant and accepted by plaintiff, subject to certain conditions and stipulations therein contained, which constituted the basis of said insurance, among which were the following conditions relating to the method of adjustment of loss and the payment thereof:

"When property is damaged the assured shall forthwith cause it

to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of the loss or damage shall; be determined by agreement between the company and the assured but if at any time differences shall arise as to the amount of any loss or damage, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case
29 of their disagreement, and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, and until such proofs are produced and — appraised permitted the loss shall not be payable. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

And defendant says that when plaintiff presented the proofs of loss it appeared therefrom that the chief loss and damage claimed was occasioned by the property insured being saturated with smoke from a fire occurring upon premises adjacent to the warehouse wherein said property was contained, and thereupon a difference arose as to the amount of loss and damage sustained by plaintiff which could not be determined by agreement between the company and the assured, said plaintiff estimating the amount of such loss at ten thousand dollars, of which he claimed five thousand dollars against this defendant under the policy sued on herein, while
30 defendant claimed that the damage was slight and the loss much less than the amount so claimed by plaintiff, which difference was within the terms of the policy above set forth and was especially adapted to appraisement as therein provided; and defendant requested of plaintiff in writing that said difference be submitted to competent and impartial persons, as provided in said policy, but plaintiff refused so to do and did not permit an appraisal to be made in accordance with the provisions of the policy, and no award has been obtained fixing the amount of plaintiff's claim, and by the express terms and conditions of said policy and loss sustained by plaintiff is not payable, and this action is not sustainable.

Third defense.

And defendant, further answering, says that in addition to the conditions and stipulations set forth in the foregoing defence the policy of insurance sued on herein provides that the company reserves the right to take the whole or any part of the damaged prop-e erty at its appraised value, and defendant says that a differenc arose as to the amount of loss and damage sustained by plaintiff, and thereupon defendant requested of plaintiff in writing that an ap-

praisal of the damaged property should be made in accord-
31 ance with the provisions of the policy, but plaintiff, in utter disregard of defendant's rights under said policy and against the protest of defendant, has sold and removed all the property insured and has deprived defendant of the rights secured by said policy to have an appraisal made of the damaged property and to take the whole or any part thereof at its appraised value, and has thereby waived his right to recover under said policy for any loss or damage to the property so sold and removed; wherefore defendant prays that it may go hence without day and recover from plaintiff its costs herein expended.

LINCOLN, STEPHEN AND LINCOLN,
PAXTON & WARRINGTON,
KING, THOMPSONS,
RICHARDS AND THOMPSON,
Att'ys for Def't.

* * * * * * *

And afterwards, to wit, on the 31st day of August, A. D. 1886, the following reply was filed in the clerk's office of said court,
32 clothed in the words and figures following, to wit:

Reply.

Circuit Court of the United States, Southern District of Ohio, West. Div.

ROBERT HAMILTON, Plaintiff,
vs.
THE LIVERPOOL & LONDON AND GLOBE INS. CO., a Corporation, etc. } No. 3901.

Now comes the plaintiff and for reply to the answer of the defendant herein denies each and every allegation of fact not alleged in the petition and not hereinafter admitted in said answer contained.

And the plaintiff, further answering, admits that when he presented his proofs of loss it appeared therefrom that the chief loss and damage claimed was occasioned by the stock being saturated with smoke from the fire occurring in the rear part of plaintiff's building, No. 415; and the plaintiff in writing — that the amount of said loss be submitted to competent and impartial persons, as provided in said policy, and specifically denies that the plaintiff refused so to do, and that plaintiff did not permit an appraisement to be made in accordance with the provisions of the policy, and
33 avers, on the contrary, that the plaintiff demanded in writing that the amount of the loss sustained by the plaintiff should be submitted to arbitration, as provided in said policy, and that the defendant refused so to submit the same; and the plaintiff denies that he has in any manner waived his right to recover his loss under said policy for the damage to the property insured, as alleged

in his petition. Wherefore plaintiff prays as he has heretofore prayed.

KITTREDGE & WILBY,
Att'ys for Plaintiff.

And afterwards, to wit, on the 19th day of March, A. D. 1887, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal X, 113.

ROBERT HAMILTON
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE CO. } No. 3901.

This day came the parties, by their attorneys; and thereupon to try the issues joined a jury, being called, came, to wit, Dan-
34 iel B. John, William E. Smith, Walter Stokes, Richard Hines, Richards F. Wales, Israel H. Pendery, John T. Weighell, P. B. Tharp, George Wynn, William J. Widner, Samuel Ainacost, and T. M. Richardson, who were duly empaneled and sworn well and truly to try the issues joined between the parties herein, and, having heard the testimony, the arguments of counsel, and the charge of the court, upon their oaths do find the issues joined in favor of the defendant. Thereupon attorneys for plaintiff gave notice of motion for new trial, and the same is filed.

And afterwards, to wit, on the 19th day of March, A. D. 1887, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

United States Circuit Court, S. D. O., W. D.

ROBERT HAMILTON, Pl'tiff,
vs.
THE LIVERPOOL & LONDON & GLOBE INS. CO. } No. 3901.

Now comes the plaintiff and moves the court to set aside the verdict hereinbefore mentioned and for a new trial herein for the following reasons, to wit:

1. The court erred at the trial in excluding evidence of-
35 fered by the plaintiff and in admitting evidence offered by the defendant; to which action of the court the plaintiff at the time excepted.

2. The court erred in its charge to the jury; to which as a whole and to specific propositions thereof the plaintiff at the time objected and excepted.

3. The court erred in directing the jury to return a verdict for the defendant.

4. The said verdict is against the *right* of the evidence.

5. The said verdict is contrary to and not sustained by the evidence.

6. The verdict is contrary to law.

KITTRIDGE & WILBY,
Att'ys for Plaintiff.

And afterwards, to wit, on the 23rd day of March, A. D. 1887, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal X, 119.

ROB'T HAMILTON
vs.
THE LIVERPOOL & LONDON & GLOBE INS. CO.

Entry overruling motion for new trial & allowing bill.

36 This cause came on to be heard upon the motion of the plaintiff for a new trial and to set aside the verdict hereinbefore rendered and was argued by counsel and submitted to the court, and the court, upon consideration, overrules said motion, to which plaintiff excepts; and it is therefore considered by the court that the defendant recover judgment upon its verdict hereinbefore rendered; that defendant go hence without day and recover its costs herein expended, taxed at $——; to all of which plaintiff excepts, and thereupon the plaintiff produced to the court his bill of exceptions and prayed that it be signed, sealed, allowed as true, and ordered to be filed and made part of the record herein, which is done and ordered accordingly this February term, 1887.

And afterwards, to wit, on the 23rd day of March, A. D. 1887, the following bill of exceptions were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Bill of Exceptions.

Circuit Court of the United States, Southern District of Ohio.

ROB'T HAMILTON
vs.
THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY. } No. 3901.

Be it remembered that at the February term of 1887 of the said circuit court this cause came on to be tried before Hon. Geo.
37 R. Sage, the district judge of the United States in and for said *for said* district, sitting as circuit judge and holding the circuit court, and a jury duly impannelled and sworn; and thereupon the plaintiff, to maintain the issues on his part, offered in evidence the original policy of insurance in the def't company, No. 2,907,224, described in the petition herein, a copy of which policy is hereto attached and made part hereof, marked Exhibit No. 1; and

plaintiff further offered evidence tending to prove the execution and delivery of said policy and the payment of the premium therefor by the plaintiff, as alleged in his petition, and also evidence tending to prove a loss by fire on April 16, 1886, under said policy to the property insured thereby, and also evidence tending to prove that plaintiff furnished proof of said loss or damage to defendant, as provided by the terms of said policy, and also evidence tending to prove the amount of his said loss or damage by fire, and that the same was a total loss, as alleged in the petition, and that the said property insured was of greater value than the amount of said policy; and the evidence offered by the plaintiff
38 tended to prove that the said loss was occasioned by the exposure to smoke of the property insured for from eight to ten hours, whereby the said property, consisting of tobacco, became saturated and impregnated with smoke and greatly impaired & damaged; and thereupon plaintiff, further to maintain the issue on his part, offered in evidence a policy of insurance on the same property, No. 762,925, in the North British and Mercantile Co., hereto attached and marked Exhibit No. 2, and thereupon plaintiff rested his case; and the defendant then, to maintain the issues on its part, offered evidence tending to prove the amount of loss or damage to the said insured property by fire and smoke; and the defendant also offered and read in evidence the correspondence, consisting of letters and enclosures therein mentioned, copies of which letters and enclosures are hereto attached and made part hereof, marked Exhibits No. 3 to No. 26, inclusive; and it was admitted that the said several letters, with the enclosures, comprising said correspondence were written and sent by the several parties, or their duly author-
39 ized agents — they purport upon their face to be, at the dates which they severally bear; and thereupon the plaintiff objected severally to the admission of the said letter dated May 3rd, 1886, with the enclosures, from Willis O. Robb to E. W. Kittredge, and marked Exhibit No. 16, and also to letter dated May 8th, 1866, and the enclosures, from J. W. De Camp to E. W. Kittredge, Exhibit No. 2; the said objection by the plaintiff to each of said letters being severally stated to be that it did not tend to establish the demand for submission to an arbitration in the manner provided in the policy of insurance set forth in the plaintiff's petition and by him offered in evidence, and the court overruled each of said objections and admitted said letters, and the plaintiff then and there severally excepted to said rulings; whereupon the defendant rested its case; and the foregoing was all the evidence offered by either party upon the issues joined upon the second and third defences of the defendant's answer and the reply of the plaintiff thereto, and all the evidence offered by either party upon the construction or interpretation of said policy and the tenth and eleventh conditions there-
40 of, and upon the question of the effect of said conditions and the rights of the parties thereunder.

And thereupon, the cause having been argued to the jury by counsel, the court proceeded to charge the jury, among other things, that on the issues joined upon the second defence of defendant's an-

swer the defendant was, upon the evidence, entitled to a verdict and the plaintiff could not recover; to which charge plaintiff then and there excepted; and the court charged the jury that it appeared from the evidence that the defendant requested the plaintiff in writing that the amount of plaintiff's loss or damage under his policy be submitted to competent and impartial persons, as provided in said policy, but that plaintiff refused so to do; to which charge plaintiff then and there excepted.

And the court charged the jury that it appeared from the evidence that the defendant requested the plaintiff in writing that the amount of plaintiff's loss or damage under his policy be submitted to competent & impartial persons, as provided in said policy, but that plaintiff refused so to do; to which charge plaintiff then and there excepted.

The court further charged the jury that it appeared from the evidence that prior to the commencement of this suit the defendant company had requested, in writing, of the plaintiff that the question of the amount of loss or damage to the property covered by the insurance policy be submitted to appraisers selected in the manner provided in the policy, at the same time insisting that such appraisers should, in their discretion, seek any evidence they deemed
41 necessary for their own full information and the forming of their own judgment as to the value and damage to the goods, and that thereafter, in answer to such request and prior to the commencement of this suit, the plaintiff refused to agree to submit the said question of the amount of loss or damage to appraisers, who should estimate the loss by their own judgment without hearing the testimony of witnesses who might be called by either party, but expressed his, the plaintiff's, willingness to submit the question of the amount of loss to competent and impartial arbitrators, provided that in the agreement for submission it should be provided that the defendant company and the plaintiff should be notified of the time of the hearing of the arbitrators, and that the arbitrators should hear all competent legal testimony that might be offered by either party, and that a reasonable time should be prescribed within which an award should be made; that thereby the defendant had requested of the plaintiff and the plaintiff had refused to submit the qustion of the amount of loss or damage under the policy to competent and impartial persons in the manner and as provided by the terms of the policy as set up in
42 the second defence of defendant's answer; to which charge the plaintiff then and there excepted; and that therefore the court instructed and directed the jury to return a verdict in favor of the defendant; to which charge and instruction the plaintiff then and there excepted, and the plaintiff excepted to the charge of the court to the whole and to each and every portion of it, as above specified, and accordingly the jury, having retired, rendered its verdict in accordance with said charge in favor of defendant and against the plaintiff, as appears of record; and the plaintiff thereafter duly filed his motion in writing to set aside said verdict and for a new trial upon the grounds that the court had erred at the

trial, first, in admitting the said evidence, consisting of said letters that — objected to by the plaintiff; second, in its charge to the jury and in directing the jury to return a verdict in favor of the defendant; and said motion, having been argued by counsel, was submitted to the court, and the court, upon consideration thereof, overruled the same and entered judgment upon said verdict and in favor of the defendant, all of which appears of record; and the plain-
43 tiff then and there excepted to the overruling of said motion and to the action of the court in rendering judgment for defendant, all of which appears of record.

And the plaintiff thereupon presented this his bill of exceptions, and prayed that the same may be allowed and signed and sealed and ordered to be made part of the record, which is done and ordered accordingly this February term, 1887, copies of all the exhibits hereto being attached and made part hereof and used instead of the original by consent of parties.

Witness my hand and seal this 23rd day of March, A. D. 1887.

GEO. R. SAGE, [SEAL.]

U. S. Dist. Judge, S. D. O., Sitting as Circuit Judge and Holding the Circuit Court upon the Trial of said Cause, There Being no Circuit Justice or Circuit Judge within the District.

44 EXHIBIT No. 3.

CINCINNATI, O., *April* 23, 1886.

Robert Hamilton, Esq., Covington, Ky.

DEAR SIR: Referring to our conversation of this morning, in the course of which you stated that you would claim a total loss under the insurance upon stock in your warehouse, No. 417 Madison street, Covington, Ky., as a result of fire occurring April 16, 1886, I beg to repeat, in behalf of the Liverpool and London and Globe Insurance Co., the notice I then gave you that if any claim for loss is to be made under policy No. 2,907,224 of this company you will be expected to conform strictly to the conditions of said policy respecting the method of presenting claims for loss, and no conditions of the policy or right of the Liverpool and London and Globe Insurance Co. thereunder are in any manner waived or abandoned by that company. You will, of course, understand the necessity of not removing or disposing of any part of said stock upon which loss is proposed to be claimed pending the settlement of the claim, unless by agreement with the insurance companies.

Very truly yours, WILLIS O. ROBB, *Adjuster.*

EXHIBIT No. 4.

COVINGTON, KY., *April* 24, 1886.

The Liverpool and London and Globe Insurance Co.

GENTLEMEN: Your favor, by W. O. Robb, adjuster, of the 23d inst. is received. We have put the property covered by policy No.

2,907,224 in order and made an inventory thereof, as required by the policy. The company has been notified of the loss, and its agent has examined the inventory and no exception has been taken so far by the company to what has been done in notifying the company and furnishing it with evidence of the loss.

45 I request that you will be more explicit in stating precisely what you wish when you say that I will be expected to conform strictly with the condition of said policy respecting the method of presenting said claims for loss.

It is necessary that I should have the room in which the property now is for the purpose of prosecuting my business. I propose to the company furnishing it with the invoice of the cost or value of the property before the loss, to send the entire stock to be sold at auction, sending the leaf to B. F. Power's tobacco warehouse, in Cincinnati, and the other property to J. H. Laws & Co., also in Cincinnati, to be sold at auction. This will be, I think, the most satisfactory way to all parties of determining the present value, and thereby ascertaining the amount of the loss.

If this not assented to by the company I shall be obliged to remove the property from my warehouse and put it in storage; and, in my judgment, the expense attending it and the disposition of it will considerably increase the amount of the loss. The property is ready for examination by your company. I desire that such examination as you wish to make shall be made at once, and that you will advise me forthwith whether you assent to the sale of the property by public auction in the manner proposed as the fairest and most satisfactory mode of ascertaining its present value.

Yours very truly, ROBERT HAMILTON.

EXHIBIT No. 5.

COVINGTON, KY., *April* 24, 1886.

J. M. De Camp.

GENTLEMEN: You are advised of the loss, on the 16th inst., upon property covered by policy No. 2,823,517 in the Liverpool and London and Globe Ins. Co., of your companies.

We have put the property in order and made an inventory of it showing its value before the loss. The property is covered

46 by insurance in several other companies, all of which we suppose you are advised of. I suppose the several companies will be willing to and desire to act in concert in this loss. It will save much trouble and expense in furnishing proofs to the several companies if they do so.

The property is ready to be examined, if you wish to make examination of it, and I propose, as the fairest and simplest way of ascertaining its value, to send it to be sold at public auction, to such parties as may be satisfactory to the several companies, or I can probably make arrangements, if it be deemed best, to put it in my adjoining warehouse, No. 417 Madison street, and, after proper advertisement, have it sold at public auction there. I hope that the companies will recognize that this is the fairest and most feasible

mode of ascertaining the present value of the property, and thereby the amount of loss it has sustained.

If the companies require further and formal proof of the loss, I wish you would advise me at once and specifically what they wish in the premises.

It is necessary, to enable me to prosecute my business, that the property should be moved as soon as possible from the present stores, and I ask for an immediate reply, and, if the company desires to examine it before its removal, that they should do so at once.

Very truly yours, ROBERT HAMILTON.

EXHIBIT No. 6.

CINCINNATI, O., *April* 24, 1886.

Robt. Hamilton, Esq., Covington, Ky.

DEAR SIR: Your favors of this date are received. This company will be pleased to have your claim presented in due course and form.

1st. Giving copy of written portion of our policy and schedule of insurance in other companies.

2d. Stating ownership of said property.

3d. How the building containing same was occupied.

4th. Origin of fire.

5th. Actual cash value of the property insured set forth as
47 insured, with the various grades and condition as to manufactured or unmanufactured.

6th. The amount of loss or damage you claim on the whole, and also as against this company, as it may be necessary to have the stock appraised by disinterested appraisers after receipt of proofs. We cannot consent to its removal, unless it be at your own expense.

It should, if possible, be left where it is, though there can be no objection to your removing it to some other warehouse at your own expense, where it can be readily inspected by appraisers. We cannot consent to your disposal of it by sale.

The matter of determining the value or damage will be one for mutual conference and greement. There is no wish to embarrass by technicalities, but we will endeavor to promptly reach a conclusion on receipt of the customary proofs of loss.

Very truly, J. M. DE CAMP, *G. A.*

EXHIBIT No. 7.

COVINGTON, KY., *April* 26, 1886.

DEAR SIRS: I inclose proof of loss under policy of your company, with invoice attached, in compliance with the requirements of the policy. If there is any defect in the substance or form of the above proof please advise me thereof at once that I may perfect the same to your satisfaction, and return the proof to me in such case for that purpose.

The property described and damaged has been invoiced and arranged and is ready for examination by your company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business and each day of delay involves considerable loss and expense to me.

As before advised, I propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies.

Please acknowledge receipt of above proofs by return mail.

Very truly yours, ROB'T HAMILTON.

48 EXHIBIT No. 7.

(Inclosed in foregoing.)

Proof of Loss under Policy No. 2,823,517.

The undersigned, in compliance with the requirements of the policy of insurance as above, states:

First. That he has sustained loss and damage upon the property insured by fire occurring on the 16th of April, A. D. 1886, and makes the following as particular an account of his loss and damage as the nature of the case will admit of.

Second. The property insured was owned by Robert Hamilton, and all contained in the three and five story brick building, being numbers 413 and 415 Madison avenue, Covington, Kentucky.

Third. The buildings were occupied by the assured as a tobacco factory.

Fourth. The origin of the fire is unknown to the undersigned.

Fifth. The fire occurred in the rear part of the building No. 415.

Sixth. The actual cash value of the property insured at the time of the fire was as set forth in the inventory hereto attached showing the kinds and condition of the property, as to its being manufactured or unmanufactured.

Seventh. But a small portion of the property insured was entirely destroyed. The chief loss and damage was occasioned by the stock being saturated with smoke from the fire, and I estimate the amount of the loss at forty thousand dollars ($40,000), which I claim upon the whole property, and as against this company under the above policy the sum of five thousand dollars.

Eighth. At the time of the loss there was the following insurance upon the property, the written description of the property in each policy being as follows:

Inventory of Property in Nos. 413 *and* 415 *Madison Avenue, Covington, Kentucky, on April* 16, 1886.

208,189 lbs. leaf tobacco, scraps, and stems, contained in hhds., boxes, and bulks	$21,871	91
126 packages licorice, 26,487 lbs.	3,808	59
49 75 lbs. Tonka beans	122	50

230 lbs. salt	1 00
3 bbls. gum, 511 lbs.	204 40
2 bbls. glycerine, 914 lbs., at 15½c.	141 67
4 bbls. glucose, 2,472 lbs.	98 88
20 bbls. sugar, etc., 5,508 lbs.	346 25
6 bbls. molasses, 305 gal., at 20c.	61 00
2 bbls. casing syrup, 75 gal.	42 90
2,338 lbs. stamped fine-cut tobacco	989 85
17,152 lbs. unstamped fine-cut tobacco	5,199 74
4,367½ lbs. stamped plug tobacco	1,216 15
38,640½ lbs. unstamped plug tobacco	7,721 02
3,229 lbs. smoking tobacco, packed	674 99
15,789 lbs. smoking tobacco, manufactured and loose	600 11
278 lbs. chewing shorts	31 70
4,040 bx. butts and pails	392 53
110,525 cloth bags for smoking tobacco	567 90
1,777 lbs. tin foil	253 14
28 lbs. colored wax	3 08
12 bx. ribbons	120 00
1,037,600 tin tags	201 93
210,300 paper strips and tags	233 03
3,500 advertising banners and show-cards	310 00
3,283 lbs. printed and unprinted paper	364 75
372,960 fine-cut, plug, and smoking labels	1,045 50
3,225 lbs. Labor Union plug tobacco, unstamped, 17c.	548 25
	$47,172 77

EXHIBIT No. 8.

CINCINNATI, O., *April* 27, 1886.

Rob't Hamilton, Esq., Covington, Ky.

DEAR SIR: I beg to acknowledge receipt of papers purporting to be proofs of loss under our policies 2,907,224 and 2,823,517. The same will have prompt examination and attention.

Noting your purpose soon to sell the stock, permit us to say
50 that we protest against such disposition of it at this stage and against this *ex parte* way of determining the loss sustained.

Conditions of our policy provide the manner and mode of determining the loss or damage, and we hereby formally demand an appraisal of the stock as to value and damage under each policy, each party to name a competent and disinterested party.

Very truly, J. M. DE CAMP, *G. A.*

EXHIBIT No. 9.

Carlisle Building, S. W. cor. Fourth and Walnut Sts.

CINCINNATI, O., *April* 27.

The Liverpool and London and Globe Ins. Co., J. M. De Camp, gen. ag't.

DEAR SIR: Yours of the 24th and 27th received, which were ad-

dressed to Mr. Robert Hamilton, and have been handed to me as his representative. Mr. Hamilton is obliged, for the prosecution of his business, to remove at once the property covered by the insurance from his factory in which the property was insured. This necessity is occasioned by the fact that every day's delay involves to him the loss of a large amount of wages to his employés, who are unable to progress with his work, and heavy expenditure and loss otherwise in the prosecution of his business.

I do not find any provision in your policy restricting the assured under such circumstances from removing or selling the damaged property. If you claim that any such provision has that force I should be glad if you should at once call my attention to it.

There are twelve policies in twelve different companies upon the property covered by your policy, No. 2,823,517. For Mr. Hamilton to be obliged to retain the same upon his premises until the several losses are adjusted would greatly impair, if not altogether destroy, the indemnity intended to be secured to him by this insurance. In yours of the 24th you express willingness that he should remove it at once at his own expense to some warehouse. to be held
51 until his claim against your company is finally adjusted. I think that you will realize that this is an expense and a loss which the company are not entitled to impose upon Mr. Hamilton. If they severally or either of them desire to have the property stored and held until such adjustment they should pay the expense of such removing, storing, insuring, and holding the same until the adjustment is made. They gave you timely notice of their situation for the very purpose of enabling you to make such examination as you might wish of the property.

The property covered by the policy above referred to will require at least two weeks from this date to remove and bring to sale, and during that time it will be subject to whatever examination you may wish to make. The property covered by policy No. 2,907,224 is already being removed to the warehouse of B. F. Power, in this city. They expect to be able to bring it to public sale by a week from next Monday, to wit, the 10th of May, and during all that time be subject to such examination as you wish to make. It does not occur to me that there can be any impediment in ascertaining the amount of the loss by an arbitration in the manner provided by the policy from the course which Mr. Hamilton indicates that he proposes to pursue.

Yours very truly, E. W. KITTREDGE.

EXHIBIT No. 10.

CINCINNATI, O., *Apr.* 28, 1886.

E. W. Kittredge, Cincinnati, O.

DEAR SIR: Your favor of yesterday, in behalf of Mr. Robert Hamilton and referring to that gentleman's claim for loss under policies No. 2,823,517 and No. 2,907,224 of the London and Liverpool and Globe Ins. Co., is at hand. You say that you do not find

any provision in our policy restricting the assured from removing or selling damaged property, and you desire that we should at once call your attention to any provision claimed to have had that force.

We believe that the second paragraph of condition 9* of
52 our policy has that force and purpose. Without attempting to give all the reasons for this belief, it may be sufficient to point out that the appraisement provided by the terms of our policies in the printed clause referred to contemplates the possibility of the company exercising the right therein reserved to take the property or any part thereof "at its appraised value." A sale of the property prior to such appraisement would deprive the company of this right. We have refused and still refuse to consent to any disposition of the property prior to the appraisement or to any *ex parte* method of fixing the amount of the loss, which our policies provide shall be determined" by agreement between the company and the assured," and by appraisement in case of difference.

As to the removal of the property, your client has stated that the loss would thereby be materially increased. You will understand, therefore, that such additional loss would necessarily be borne by him and not by the company whose protest against such removal has been made. The proposed removal is expressly designed by Mr. Hamilton for his own advantage in the ordinary prosecution of his business, and the indemnity furnished by insurance does not extend to losses sustained in that direction. We protest against this removal, furthermore, because it takes away from the view of the appraisers the actual surroundings, location, and condition of the property at the time difference of opinion arose, and would thus materially affect the judgment of the appraisers as to the loss sustained.

We ask you for a direct answer to our request for an appraisemen, and desire that any further communication be directed to that point only.

You will please take notice that any disposition of the property by sale prior to the appraisement will be understood and accepted by us as a refusal upon the part of your client to permit such appraisement and as a relinquishment of all claims under the policies of this company.

Very truly yours, WILLIS O. ROBB, *Adjuster.*

53 EXHIBIT No. 11.

CINCINNATI, OHIO, *April* 29, 1886.

The Liverpool and London and Globe Insurance Company.

DEAR SIRS: Your favor of the 26th, signed by Wm. O. Robb, adjuster, is received. We were already in receipt of a communication addressed to Mr. Hamilton and signed by all the companies concerned, including Mr. Robb's signature for the Liverpool and London and Globe Insurance Company, in relation to the property in

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*Should be condition 10. See letter of May 8th.

the buildings Nos. 413 and 415, covered by your policy No. 2,823,517. We are also in receipt of your favor by J. M. De Camp, general agent, of the 24th, in which he advised Mr. Hamilton that while it should, "if possible, be left where it is, though there can be no objection to removing it to some other warehouse at your own expense, where it can be readily inspected by appraisers." Since the receipt of this letter, viz., of the 24th, the property in No. 417 has been in large part removed to the warehouse of W. O. Power, in this city, where it is subject to your inspection.

Permit me to say that Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies.

He has believed that in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent. of the leaf-tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is in substance and effect an appraisement in detail of every package by the entire trade in this city.

But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auc-
54 tion, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award.

There can be little difficulty in determining the value of all the property other than tobacco. Indeed, I think you would agree about that with Mr. Hamilton without any arbitration. It might not be difficult to adjust by arbitration or agreement the value of the manufactured tobacco without a sale of it; but the leaf tobacco was all bought by Mr. Hamilton at public sale, and fair evidence of its value, or none at all, to be compared in fairness and reliability, can be obtained of the leaf tobacco in place of the price that it brings in open market at public sale.

It is necessary to Mr. Hamilton that the leaf tobacco shall be sold under any circumstances—that is to say, it is impossible for him to use it in his business, and if he were uninsured, or if his insurance were settled, he would dispose of it in the manner proposed by public sale.

Mr. Hamilton informs me that he estimates his loss by every day's stoppage of his business at no less than five hundred dollars per day. This fact renders it necessary that he should insist upon prompt action in the premises.

If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you and submit to me the form of an agreement for arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him.

Permit me to say that Mr. Hamilton in no event proposes to relinquish his claim under his policies, and that any inference of that kind will be totally unwarranted.

Very truly yours, E. W. KITTREDGE.

Joint Correspondence.

CINCINNATI, O., *April* 28, 1886.

Robert Hamilton, Esq., Covington, Ky.

DEAR SIR: The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco
55 factory, Nos. 413 and 415 Madison street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons chosen as provided for in the several policies of insurance under which claim is made and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared.

We further desire jointly to protest against the removal, sale, or other disposition of the property until such an appraisement has been had and to notify you that the insuring companies will in no way be bound by such *ex parte* action.

You may address your reply to the joint demand made above in care of the Liverpool and London and Globe Ins. Co., Third and Main streets, Cincinnati.

Waiving none of the rights of the several companies under the terms of their respective policies, we are

Very truly yours,

JNO. H. LAW, *For Royal Ins. Co.*
MILO E. LAWRENCE,
For Firemen's Fund Ins. Co.
H. F. WEBBER,
Adjuster for Connecticut Fire Ins. Co.
J. N. COLE, *Adjuster for Home Ins. Co.*
T. W. EUSTIS,
For Phœnix Ins. Co. of Brooklyn.
J. F. FOLLETTE,
For City of London Fire, British America Assurance Co.
FIREMEN'S INSURANCE COMPANY
OF CINCINNATI, O.,
By M. HOLLINGSHEAD, *Adjuster.*
THE NEW YORK ALLIANCE,
By LEON BRYANT, *Adjuster.*
WILLIS O. ROBB,
For the Liverpool and London and Globe Ins. Co.
56 JNO. H. LAW,
For the Firemen's Ins. Co. of Dayton.
A. O. KAPLAN,
For Phœnix Ins. Co. of Hartford, Conn.

EXHIBIT No. 13.

CINCINNATI, O., *April* 29, 1886.

Messrs. J. H. Law & Bro.

GENTLEMEN: Your favor of 28th to me, together with a letter of the several insurers to Robert Hamilton, handed to me by him, is received. Am I to understand that in addressing you I am addressing all the insurers upon the property of Mr. Hamilton in Nos. 413 and 415, and do not need to address the companies separately?

Permit me to say that Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies.

He had believed that in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent. of the leaf-tobacco business is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is, in substance and effect, an appraisement in detail of every package by the entire trade in this city.

But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award.

There can be little difficulty in determining the value of all the property other than tobacco. Indeed, I think you would
57 agree about that with Mr. Hamilton without any arbitration.

It might not be difficult to adjust by arbitration or agreement the value of the manufactured tobacco without a sale of it; but the leaf tobacco was all bought by Mr. Hamilton at public sale, and no fair evidence of its value, or none at all to be compared in fairness and reliability, can be obtained of the leaf tobacco in place of the price that it brings in open market at public sale.

It is necessary to Mr. Hamilton that the leaf tobacco shall be sold under any circumstances—that is to say, it is impossible for him to use it in his business, and if he were uninsured or if his insurance were settled he would dispose of it in the manner proposed by public sale.

Mr. Hamilton informs me that he estimates his loss by every day's stoppage of his business at not less than five hundred dollars per day. This fact renders it necessary that he should insist upon prompt action in the premises.

If the proposed arbitration is satisfactory will you at once inform me of the arbitrator selected by you, and submit to me the form of

agreement of arbitration which you propose. Mr. Hamilton will do the like in respect to the arbitrator selected by him.

Yours very truly, E. W. KITTREDGE.

EXHIBIT No. 14.

CINCINNATI, O., *April* 30, 1886.

E. W. Kittredge, Esq., Cincinnati, O.

DEAR SIR: In reply to your favor of the 29th inst., addressed to John H. Law & Bro., in which you say that "Mr. Hamilton will accede to 'our proposition' (for submission to arbitrators) upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction in order that its value, thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award," we beg leave to say that we must insist upon arbitration, in accordance with the terms of our several contracts, without importing into it any conditions as to the sale of the property.
58 Such conditions would be incompatible with the provisions of our several policies of insurance and the rights of the insuring companies thereunder.

As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for we will submit the name of an arbitrator, and also a form of agreement for arbitration. We have been nowise responsible for any stoppage of Mr. Hamilton's business, and any delay, past or future, must be attributable to Mr. Hamilton himself, as we have been prepared from the outset, and are still prepared, to take prompt action in bringing the matter to a determination.

Very respectfully,

WILLIS O. ROBB,
For Liverpool and London and Globe Ins. Co.
H. F. WEBBER,
For Connecticut Fire Ins. Co.
H. F. WEBBER,
For Penn. Ins. Co.
M. HOLLINGSHEAD,
For Firemen's Ins. Co. of Cincinnati, O.
JNO. H. LAW,
For Royal Ins. Co.
EDWARD STANBERY,
For Firemen's Ins. Co. of Dayton.
J. M. COLE,
For Home Ins. Co. of New York.
LEON BRYANT,
For New York Alliance and Firemen's Fund.
WILLIS O. ROBB,
For City of London Fire Ins. Co. and British America Assurance Co.
A. O. KAPLAN,
For Phœnix Ins. Co. of Hartford, Conn.

59 EXHIBIT No. 15.

CINCINNATI, O., *April* 30, 1886.

The Liverpool and London and Globe Ins. Co. and other companies insuring Robert Hamilton.

DEAR SIRS: Yours of the 30th received, signed in behalf of the twelve companies insuring Robert Hamilton, and I address you in behalf of them all.

Mr. Hamilton and I in his behalf deny that the arbitration in the manner indicated is in violation of the terms of any of the policies or imports any condition into it which the insured is not entitled to insist upon or which is incompatible with the provisions of the several policies of insurance or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed me to express his readiness, to proceed at once with an arbitration, which, as he understands it, is in substantial compliance with the arbitration provided for in all the several policies; but they are not alike in their provisions upon this subject of arbitration, and a literal compliance with some of them would be inconsistent with a literal compliance with others. The only way, as it seems to me, that Mr. Hamilton, or I in his behalf, can determine whether what you call the "arbitration called for" is what Mr. Hamilton understands to be the "arbitration called for" and is willing to accede to is for you to indicate what you understand the arbitration called for to be by submitting a form of agreement for arbitration, or in some other mode indicating the specific terms of the arbitration which you have demanded.

I wish to say that, as I understand the expression in my letter of the 29th, that "it" (the tobacco) "shall then be sold at public auction in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award," does not in anywise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibity of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity

60 of examining the property, and that the award shall not be made until after the sale has taken place and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made. An early answer is solicited.

Yours truly, E. W. KITTREDGE.

EXHIBIT No. 16.

CINCINNATI, O., *May* 3, 1886.

E. W. Kittredge, Esq., Cincinnati, O.

DEAR SIR: In compliance with the request in your letter of April

30th, addressed to the companies insuring Robert Hamilton, we herewith inclose a form of agreement for "submission to appraisers," which is in practical accordance with the conditions of the policies of the several companies and which all the companies are willing to sign and abide by the award reached thereunder.

We must again decline to entertain your proposition that the arbitrators after examining the stock shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may in their discretion seek any evidence they deem necessary for their own full information and the forming of their own judgments as to the value and damage of the goods, but we insist that under the condition of the several companies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value.

The companies propose to stand upon the conditions of their policies and decline all propositions looking to a waiver thereof or adding new and inconsistent conditions thereto.

Although your letter was apparently intended only for the
61 companies interested in Nos. 413 and 415 Madison Ave., you may take the foregoing as written in behalf of the insurers in No. 417 as well.

Very truly yours,

THE LIVERPOOL AND LONDON AND GLOBE INS. CO.,
By WILLIS O. ROBB,
Adjuster for the Companies Insuring Robert Hamilton.

Submission to Appraisers.

Inclosed in foregoing.)

The insurance companies whose names are hereunto subscribed having heretofore issued to Robert Hamilton, of Covington, Ky., their policies of insurance upon his property therein described, and particularly upon tobacco, and said Hamilton claiming a loss therein by a fire of April 16, 1886, and the companies and Robert Hamilton desiring an appraisement to be made, pursuant to the terms of said policies—

It is hereby agreed by Robert Hamilton, of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that —— —— and —— —— shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below and as hereinafter provided. In case of disagreement said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers or any two of them made in writing in accordance with this agreement, pursuant to the terms of

the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property immediately before the fire, and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate, or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies.

The property upon which the loss or damage is to be determined is:

62 It is expressly understood and agreed that in determining the loss or damage upon said property the said appraisers are to make an estimate, article by article, of the actual cash value of the property immediately before the fire, and in the same manner, article by article, of the loss or damage thereto.

Witness our hands, at ——, this — day of ——, 1886.

Declaration of Appraisers.

STATE OF ——, } *ss:*
County of ——, }

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisement and estimate of the sound value and the loss and damage upon the property hereinbefore mentioned in accordance with the foregoing appointment, and that we will make a true, just, and conscientious award of the same according to the best of our knowledge, skill, and judgment. We are not related to the assured, either as creditors or otherwise, and are not interested in said property or in the insurance thereon.

Sworn to before me by said —— and subscribed by them in my presence this — day of ——, 1886.

Award of Appraisers.

To the parties in interest:

Having carefully examined the premises and the property hereinbefore specified agreeably to the foregoing appointment, we have determined the sound value of said property immediately before the fire and the loss and damage thereon as per the accompanying schedule to be as follows:

Articles.	Cash value as sound.	Appraised damage.

Witness our hands this — day of ——, 1886.

(Appraisers.)

63 EXHIBIT No. 17.

CINCINNATI, *May* 4, 1886.

The Liverpool and London and Globe Ins. Co., for itself and for the companies insuring Robert Hamilton.

GENTLEMEN: Your favor of the 3rd is received. In connection

with the interview which I had with Willis O. Robb, representing you, on Saturday last, there can be no misunderstanding as to the position taken by the companies and the assured in this matter.

1st. I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do.

2nd. As I stated to Mr. Robb, Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement through their own appraisers of the value of the stock, and that they shall jointly, or either of them with the consent of the rest, have the right to take the stock in whole or in part at their appraisal.

3rd. Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock.

4th. I submitted to Mr. Robb on Saturday a statement of the character of arbitration which Mr. Hamilton was ready to consent to upon the demand of the company; and upon his statement that it was not such an arbitration as the companies demanded, to prevent all misapprehension, I wrote and submitted to him informally a demand for arbitration in Mr. Hamilton's behalf, which I now inclose signed and formally submit to the several companies. It bears date May 1st, being the time when it was written, but is submitted as of this date. * * *

Yours truly, E. W. KITTREDGE.

64 Inclosed in foregoing.)

To the Liverpool and London and Globe Ins. Co. and the companies jointly acting with it in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison street, Covington, Ky.:

Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th of April, and will select an arbitrator to represent him in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party as well as personally examine the damaged goods in considering and awarding the amount of the loss.

Yours truly, E. W. KITTREDGE.

May 1, 1886.

P. S.—The above will apply also to the property insured in No. 417.

E. W. K.

EXHIBIT No. 18.

CINCINNATI, O., *May* 5, 1886.

E. W. Kittredge, Esq., Cincinnati, O.

DEAR SIR: Your communication of the 4th is at hand. We have nothing to add to our letter of the 3rd; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of "submission to appraisers" that does not provide for the introduction of "all competent legal testimony that may be offered by either party" (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evidence based on a sale of the property), we must accept your communication as a refusal to comply with our request and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter.

Very truly yours,

THE LIVERPOOL AND LONDON AND GLOBE INS. CO.,
By WILLIS O. ROBB,
Adjuster for the Companies Insuring Robert Hamilton.

65 EXHIBIT No. 19.

CINCINNATI, O., *May* 7, 1886.

E. W. Kittridge, Esq., city.

DEAR SIR: Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit:

"I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made."

This does not correctly state our position, which remains now as stated in our communication of the 3rd, to wit: "The appraisers may, at their discretion, seek any evidence they deem necessary for their own full information." What we do object to and protest against is the sale of the goods or the consideration by the appraisers of evidence founded on that fact or result.

If the form of "submission to appraisers" we submitted contains any provision or condition limiting or defining the duties of the appraisers and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party.

Very truly, J. M. DE CAMP,
General Agent.

(Close of joint correspondence.)

EXHIBIT No. 20.

CINCINNATI, *May* 8, 1886.

E. W. Kittridge, Esq.

ATTORNEY AND DEAR SIR: On behalf of the Liverpool and London and Globe Ins. Co. we demand an appraisal of the value of and damage to the goods insured under our policies Nos. 2,823,517 and 2,907,224, issued to Rob't Hamilton, of Covington, Ky., as the same could not be determined by mutual agreement between us, and we take exceptions to the amount of loss and damage as stated in your claim.

We herewith submit a form of agreement of submission
66 to appraisers which we deem in strict accordance with the terms and conditions of our policies, and upon your assent thereto will be prepared to name our appraiser. In our letter of April 27th read condition 10 instead of condition 9.

Yours very truly, J. M. DE CAMP, *G. A.*

Liverpool and London and Globe Insurance Company Agreement.

—— —, 18—.

It is hereby agreed by Robert Hamilton, of the one part, and the Liverpool and London and Globe Insurance Company, on the other part, that —— —— (together with a third person to be appointed by them if necessary) shall appraise and estimate at the true cash value the damage by fire to the property belonging to Robert Hamilton, as specified in the accompanying schedule, which appraisement and estimate by them, or any two of them, shall be binding on both parties, so far as regards such appraisement, it being understood that this appointment is without reference to any other questions within the terms and conditions of the insurance, being so far only as regards the value of or damage to such property as may be found to have been saved in a damaged condition which was secured by policy No. 2,323,517 with the said insurance company.

Witness: J. M. DE CAMP,
G. A. Liv. & Lon. & Globe Ins. Co.

STATE OF ——, *County of* —— :

Declaration of Appraisers.

We, the undersigned, do solemnly swear that we will act with impartiality and fidelity in making an appraisement and estimate of the damage to the property of —— insured by the Liverpool and London and Globe Insurance Company and saved in a damaged condition agreeably to the foregoing appointment, and that
67 we will return to the said insurance company a true and perfect and a just and conscientious appraisement and estimate of damage on the same according to the best of our knowledge, skill, and judgment.

Sworn and subscribed to before me this — day of ——, 18—.

 —— ——.

EXHIBIT No. 21.

CINCINNATI, O., *May* 10, 1886.

The Liverpool and London and Globe Ins. Co.

GENTLEMEN: Your favor of the 7th, mailed on the 8th, was received Saturday evening. It does not seem to me that it materially modifies or qualifies the conclusions already reached between the insurance companies and Robert Hamilton.

I am to-day in receipt of your favor of the 8th, inclosing a form of agreement of submission to appraisers. In view of the number and diverse provisions of the several policies upon Mr. Hamilton's property and of what has transpired, I do not conceive that the several companies are now entitled each to demand a separate submission to arbitration by Mr. Hamilton.

It does not seem to me that any provision in the policies of your company provides for a submission to appraisers in the manner expressed in the form of agreement inclosed, and I have already expressed in the correspondence upon the joint demand of all the companies my reasons for this opinion and my objections to this form of submission.

I am very truly yours, E. W. KITTREDGE.

EXHIBIT No. 22.

CINCINNATI, *May* 13, 1886.

Mr. Robert Hamilton, Covington, Ky.

DEAR SIR: Objecting to the amount of your claim for loss and damage under policies 2,823,517 and 2,907,224, we demand, according to condition 10 of the policies, that the differences which have arisen between us as to sound value and loss or damage to the goods covered by said policies shall be submitted, at equal expense between us, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall elect an umpire to act with them in case of their disagreement.

68 We name as our appraiser Wm. Spear, of St. Louis, and upon the naming of your appraiser we will meet you to sign an agreement embodying the provisions of our policies without any conditions.

Please take notice that this company reserves the right to take the whole or any part of the property insured at its appraised value; and you are further notified that until such an appraisal is permitted and had our loss, if any, will not be payable.

Very truly, J. M. DE CAMP, *Gen. Ag't.*

EXHIBIT No. 23.

CINCINNATI, O., *May* 15, 1886.

The Liverpool and London and Globe Insurance Co.

DEAR SIRS: Your favor of the 13th, with inclosures addressed to Rob't Hamilton, is received this day.

Mr. Hamilton adheres to the position taken by him in the joint correspondence between the insurers and Mr. Hamilton and myself in his behalf.

Mr. Hamilton has acted upon the conclusion reached in that correspondence, and I do not understand that your company proposes to change its own attitude as taken in that correspondence.

Very truly, E. W. KITTREDGE.

CINCINNATI, O., *May* 17, 1886.

The Liverpool and London and Globe Insurance Co.

DEAR SIRS: I beg to inclose a notice from to-day's "Cincinnati Commercial Gazette" of the sale of the tobacco of Robert Hamilton by you insured.

Very truly yours, E. W. KITTREDGE,
By E. K. STALLO.

EXHIBIT No. 24.

For Sale.

On the 27th day of May, 1886, at the warehouse of B. F. Power, Nos. 54 and 58 W. Front street, Cincinnati, O., will be sold at public auction the stock, consisting of 208,189 pounds of leaf tobacco, scraps, and stems, exposed in the tobacco factory Nos. 413 and 415 Madison avenue, Covington, Ky., at fire occurring April 16,
69 1886, sale to commence at 9 o'clock a. m., to be continued from day to day thereafter until the entire property is sold.

CINCINNATI, O., *May* 20, 1886.

The Liverpool and London and Globe Insurance Co.

DEAR SIRS: I beg to inclose a notice from yesterday's Covington's "Daily Commonwealth" of the sale of the tobacco and articles in said notice named of Robert Hamilton by you insured.

Very truly yours, E. W. KITTREDGE,
By E. K. STALLO.

For Sale.

On the 29th day of May, 1886, at the warehouse of Robert Hamilton, 417 Madison avenue, Covington, Ky., will be sold at public auction the stock, consisting of—

2,338 lbs. stamped fine-cut tobacco.

17,152 lbs. unstamped fine-cut tobacco.

2,400 lbs. fine-cut leaf tobacco.
4,376½ lbs. stamped plug tobacco.
41,865½ lbs. unstamped plug tobacco.
8,000 lbs. plug tobacco.
3,347 lbs. stamped smoking tobacco and shorts.
160 lbs. unstamped smoking tobacco and shorts.
15,789 lbs. smoking tobacco, leaf, and shorts in process.
26,487 lbs. mass and powdered licorice.
5,508 lbs. sugar.
4,040 boxes butts and pails.
110,525 cloth smoking bags.
1,083,600 tin tobacco tags.
210,300 paper strips and tags.
3,500 advertising show cards and banners.
372,960 fine-cut, plug, and smoking labels.
3,283 lbs. printed and unprinted paper.
639 lbs. smoking flavor.

Exposed in the tobacco factory of Robert Hamilton, Nos. 413 and 415 Madison avenue, Covington, Ky., at fire occurring April
70 16, 1886, sale to commence at 9 o'clock a. m., to be continued from day to day until the entire property is sold.

June 3, 1886.

EXHIBIT No. 25.

CINCINNATI, O., *June* 3, 1886.

The Liverpool and London and Globe Ins. Co., J. M. De Camp, gen. ag't.

DEAR SIR: Recurring to your favors of May 13th in respect to the loss of Robert Hamilton's property covered by your policies, I desire to say that Mr. Hamilton has disposed of the property claimed to have been damaged in the fire of April 16th by sale at public auction, in pursuance of the notice communicated to your company.

If your company really desire to submit to arbitration the question of the amount of loss sustained by Mr. Hamilton, notwithstanding all that has transpired, Mr. Hamilton is quite ready now to submit that question to competent and impartial arbitrators. He simply demands, the arbitrators being chosen, that in the agreement for submission it shall be provided that the company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered.

I do not know Mr. William Spear, of St. Louis, mentioned by you in your favor of the 13th, nor do I know whether you name him with any desire or willingness to consent to a submission to arbitration to fix the amount of loss as above proposed. If you do, I beg to inquire what is Mr. Spear's occupation, and what, if any, connection he has, as agent or otherwise, with any insurance company Of course, you expect the arbitration to be held in Covington o

Cincinnati, and we should wish to be assured that Mr. Spear would be present so that the arbitration could be held forthwith.

I beg to call your attention to the fact that your policies limit the time within which Mr. Hamilton must commence his actions
71 under them, and the time is provided when suits may be brought, and he cannot consent to a postponement of this question of arbitration to any time inconsistent with his right to bring actions and to prosecute his suits in a court of law.

Yours very truly, E. W. KITTREDGE,
For ROB'T HAMILTON.

EXHIBIT No. 26.

CINCINNATI, *June* 7, 1886.

E. W. Kittredge, Esq., city.

DEAR SIR: Your favor of the 3d is at hand, in which you in effect inform us that Mr. Hamilton has disposed of his stock claimed to have been damaged in the fire of April 16th, and that if we really desire it he is willing to agree to an arbitration wherein the agreement shall provide that the arbitrators shall hear all competent legal testimony that may be offered by either party.

As you have in spite of our protest sold and scattered the goods, so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take the property or any part thereof at its appraised value, we must accept your action as a refusal to accede to our demand for submission of the differences that have arisen between us.

By the course pursued, Mr. Hamilton has, in our judgment, waived any rights he may have had under the policies, and this company will stand upon its legal rights in the premises.

Very truly, J. M. DE CAMP, *G. A.*

72 EXHIBIT No. 1.

No. 2,907,224. $5,000.00.

The Liverpool & London and Globe Insurance Company.

Liverpool: 1 Dale street. London: Cornhill & Charing Cross.
New York: William street.

Cincinnati general agency. J. M. De Camp, general agent.

This policy of insurance witnesseth that Robert Hamilton, Esq. having paid to the Liverpool & London & Globe Insurance Company the sum of fifty — for the insurance against loss or damage by fire (subject to the conditions and stipulations which constitute the basis of this insurance) of the property hereinafter described to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely, five thousand dollars on his tobacco in hogsheads, his own, held in trust, on commission, or

sold, but not delivered where he may be legally liable, contained in the three-story metal-roof brick building known as the "Kenton tobacco warehouse," situated Nos. 212, 214, 216, 218, and 220 Greenup St., Covington, Ky.

Other insurance permitted.

The two directors of the said company whose names are hereunto subscribed do hereby agree that from the 5th day of September, 1885, until the 5th day of Sept., in the year of our Lord one thousand eight hundred and eighty-six, the funds and property of the said company shall (subject to the following conditions and stipulations, which constitute the basis of this insurance) be subject and liable to pay, reinstate, or make good to the said assured, — heirs, executors, or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured, not exceeding in each case, respectively, the sum or sums hereinbefore severally specified and stated against each property.

Conditions Relating to the Methods of Adjustment of Loss and the Payment Thereof.

10. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein, for what purposes and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or a notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company and subscribe to such examinations when reduced to writing, and shall also produce their books of accounts and other vouchers and exhibit the same for examination at the office of the company and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company, and as a part of the preliminary proofs of loss the assured shall, if the claim be for building destroyed by fire, procure the duly verified certificate of some reliable and responsible builder in detail as to the actual cash value of it immediately before said fire, which shall be attached to and form a part

of such proofs, and, if required so to do, shall furnish the company with plans and specifications of the buildings destroyed, which shall be duly verified by the oath of the assured.

When property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company, and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole or any part thereof at its appraised value; and, provided further, that it shall be optional with the company to repair, rebuild, replace, or restore the property lost or damaged within a reasonable time, giving notice of their intention so to do within thirty days after the receipt of the proofs herein required.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable in case of loss to a third party or held as collateral security the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy.

11. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit

or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

By accepting this policy the assured agrees to become bound by its terms and conditions.

In witness whereof we, two of the directors of the said company, have hereunto set our hands and seals this 5th day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Not valid unless countersigned by the duly authorized agent of the company at Covington, Ky.

CHARLES H. MARSHALL. [SEAL.]
ROB'T B. MINTURN. [SEAL.]

Examined.
Entered.
Countersigned.
JNO. P. HARBICK, *Agent.*

Endorsement slip: Answer questions on back.

If a removal use this only to report amendments, transfers, partial cancellations, or rebates made on policies.

LIVERPOOL & LONDON & GLOBE
INSURANCE COMPANY.
S. M. DE CAMP,
Gen. Agent, Cincinnati.

No. of policy, 2,907,224.
Amount insured, $5,000.
Endorsement dated M'ch 6, 1886.
Expires Sept. 5, '86.
Name of assured, Robert Hamilton, Esq.

Transferred to cover leaf & manufactured tobacco and material making the same contained in the 3rd, 4th, and 5th floors or cellar of the 5-story brick warehouse building situated Nos. 417, west side Madison street, Covington, Ky.

Risk ceasing at former location from date hereof.

JNO. P. HARBICK,
Agent at Covington, Ky.

[Endorsed:] Robert Hamilton, Esq. Stock, Kenton tobacco warehouse. The Liverpool & London & Globe [vignette] Insurance Company. Fire policy No. 2,907,224. Amount insured, $5,000.00. Premium, $50.00. Expires Sept. 5, 1886, at 12 o'clock noon. Please to read your policy and the conditions. Covington, Ky. Jno. P. Harbick, ag't. J. M. De Camp, general agent, Third and Main streets, Cincinnati.

73 EXHIBIT No. 2.

No. 762,925. $5,000.00.

United States branch North British and Mercantile Insurance Company.

Incorporated 1809.

[Vignette.]

Office, 54 William street, New York.

61 Threadneedle St., London. 64 Princes street, Edinburgh.

By this policy of insurance the North British & Mercantile Insurance Co., in consideration of the receipt of fifty-seven & $\frac{50}{100}$ dollars, do insure Robert Hamilton, Esq., against loss or damage by fire on the property hereinafter described to the amount of five thousand dollars ($5,000.00), on his stock of tobacco, manufactured, unmanufactured, and in process of manufacture, materials for making same, including packages, all which — contained in the 3rd, 4th, and 5th floors & cellar of the 5-story brick building situated # 417 Madison Ave., Cov., Ky.

Other insurance permitted without notice until required.

Privilege of making alterations & repairs.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured or containing the property insured and the several parts thereof were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise nor related to the assured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss and subscribe to such examination when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claims under this policy, and shall also produce their books of account (bills, invoices, or other vouchers) and exhibit the same for examination at the office of the company and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and in-

voices the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the company; and as a part of the preliminary proofs of loss the assured shall, if the claim be for building destroyed by fire, procure the duly verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire; and if required so to do furnish the company with correct plans and specifications of the buildings destroyed or damaged or correct copies thereof, which shall be duly verified by the oath of the assured, and which shall be attached to and form part of said proofs.

When personal property is damaged the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall be determined by mutual agreement between the company and the assured, or, failing to thus agree, the same shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise nor related to the assured or sufferers) to be mutually appointed by the assured and the company, their report, in writing, to be made under oath before any magistrate or other properly commissioned person, one-half of the appraisers' fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth in the proofs of loss, together with their respective interests therein.

If this policy is made payable in case of loss to a third party or held as collateral security the proofs of loss shall be made by the party originally insured unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall forfeit all claim on this company and shall be a complete bar to any recovery for loss under this policy.

In case differences shall arise touching any loss or damage the company at any time (before or after proof of loss) and the assured after proof of loss to the company may demand in writing that the matter shall be submitted to disinterested and impartial appraisers, one to be selected by the assured and one by the company, and the two so selected shall (if necessary) select a third, and the award of any two of them in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy; and, further, that it shall be optional with the company to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within

thirty days after receipt of the proofs herein required; and in case this company elect to rebuild (or not) the assured shall, if required, furnish plans and specifications of the buildings damaged or destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same, and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value (at the time of the fire); but it is expressly understood that when any municipal ordinance, rule, or regulation shall preclude the repairs or rebuilding the company shall be liable only for such sum as would otherwise be the cost to repair or rebuild.

13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur, and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

The use of kerosene oil, when of the standard of 110° Fahr. quality, for lights only, in stores and dwellings, is permitted, provided the same shall be drawn and the lamps filled and trimmed by daylight only and without the use of artificial light.

Gas.—The generating or evaporating within the building or contiguous thereto of any substance for a burning gas or vapor or the use of gasoline for lighting is prohibited under this policy unless permitted in writing hereon.

Fences and other yard fixtures, sidewalks, also store furniture and fixtures, are not covered by the insurance on building, but must be separately and specifically mentioned by name.

Plate-glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not insured under this policy unless separately and specifically mentioned.

Frescoed work or gilding on walls or ceilings is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy will vitiate the same unless notice thereof be first given this company and its permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs without notice or endorsement.

And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in refer-

ence to the foregoing terms and conditions and to the classes of hazards, memoranda, and conditions printed on the second page of this policy, all of which are hereby declared to be a part of this contract and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing.

In witness whereof the North British and Mercantile Insurance Company have caused these presents to be signed and sealed by two of their directors and attested by one of their managers, in the city of New York, but the same shall not be binding until countersigned by the duly authorized agent of the company at ——.

EZRA WHITE, [SEAL.]
EGISTO P. FABBREY, [SEAL.]
Directors.
W. R. DELANEY & CO., *Agents.*

SAM. P. BLAGDEN, *Manager.*

Countersigned at Covington, Ky., this 3rd day of April, 1886.

[Endorsed:] Assured, Robert Hamilton, Esq. Location, 417 Madison Ave. The North British and Mercantile Insurance Co. of London & Edinburgh. No. of policy, 762,925. Amount insured, $5,000.00. Premium, $57.50. Expires Apr. 3, 1887, at 12 o'clock noon.

Received Oct. 15, 1885.

74 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Robert Hamilton and The Liverpool and London and Globe Insurance Company of Great Britain, a manifest error hath happened, to the great damage of the said Robert Hamilton, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 1st day of April, 1887, in the year of our Lord one thousand eight hundred and eighty-seven.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 3901. Robert Hamilton *vs.* The L. & L. & G. Ins. Co. Writ of error. Filed —— —, 18—. —— ——, clerk.

75 THE UNITED STATES OF AMERICA, *ss:*

To the Liverpool and London and Globe Insurance Company of Great Britain, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Robert Hamilton is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this first day of April, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

GEO. R. SAGE,
District Judge S. D. O., Sitting and Holding the Circuit Court for said District, no Circuit Judge or Circuit Justice Being Present.

Service accepted and appearance entered for defendant in error.
KING, THOMPSON, RICHARDS & THOMPSON.
LINCOLN, STEPHENS & LINCOLN.

Cin'ti, Apr. 2, 87.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 3901. Robert Hamilton *vs.* The L. & L. & G. Ins. Co. Citation to defendant in error. Filed —— —, 18—. —— ——, clerk.

76 And afterwards, to wit, on the 1st day of April, A. D. 1887, the following assignment of error and prayer for reversal was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supreme Court of the United States.

ROBERT HAMILTON, Plaintiff,
vs.
THE LIVERPOOL AND LONDON & GLOBE INSURANCE COMPANY.
No. 3901. In Error.

Error to U. S. circuit court, S. D. O., W. D.

Assignment of Errors and Prayer for Reversal.

At the October term, in the year of our Lord one thousand eight hundred and eighty-seven, to wit, on the second Monday in the month of October, in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Robert Hamilton, by his attorneys, Edmund W. Kittredge and Joseph Wilby, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

That the court below erred at the trial of said cause in admitting evidence offered by the defendant in error to which the said plaintiff in error then and there objected and excepted; and in this, to wit, that the said court erred at the trial of said cause in directing the jury to return a verdict for the defendant in error, the defendant below; and in this, to wit, that the said court erred at the trial in its charge to the jury, and especially in directing the jury
77 that upon the issues joined upon the special defences in the answer of the defendant below that the plaintiff in error, the plaintiff below, could not recover; and in this, to wit, that the court below erred in overruling the motion of the plaintiff in error, the plaintiff below, to set aside the verdict and for a new trial for the grounds in said motion set forth; and in this, to wit, that the said court below erred in rendering judgment upon said verdict in favor of defendant in error, the defendant below, when by the law of the land the said verdict and judgment should have been in favor of the plaintiff in error, the plaintiff below.

And the said Robert Hamilton prays that the said judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason and occasion of said judgment.

ROBERT HAMILTON,
By E. W. KITTREDGE,
JOSEPH WILBY,
His Counsel.

78 UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio, } *ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true, correct, and complete transcript of the proceedings had by the court aforesaid in the cause wherein Robert

Hamilton is plaintiff and The Liverpool & London & Globe Ins. Co. is defendant, No. 3901, as the same appears from the files and records now in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, this 2nd day of April, A. D. 1887.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN, *Clerk*,
By R. C. GEORGI, *Deputy*.

79 Supreme Court of the United States.

ROBERT HAMILTON, Plaintiff, *vs.* THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, Defendant.	No. 3901. Error to the Circuit Court of the United States for the Southern District of Ohio.

The defendant in error is hereby notified, pursuant to the rule declared March 28th, 1887, by the Supreme Court of the United States regulating the printing of records and transcripts in that court, that in the above-entitled cause we shall rely on the following errors in the record, to wit:

That the court below erred at the trial of said cause in admitting evidence offered by the defendant in error, defendant below, to all of which the said plaintiff in error then and there objected and excepted.

And in this, to wit, that the said court erred at the trial of said cause in directing the jury to return a verdict for the defendant in error, the defendant below.

And in this, to wit, that the said court erred at the trial in its charge to the jury, and especially in directing the jury that upon the issues joined upon the special defences in the answer of the defendant below that the plaintiff in error, the plaintiff below, could not recover.

And in this, to wit, that the court below erred in overruling the motion of the plaintiff in error, the plaintiff below, to set aside said verdict and for a new trial upon the grounds in said motion set forth.

And in this, to wit, that the court below erred in rendering judgment in favor of the defendant in error, the defendant below, when by the law of the land the said judgment should have
80 been in favor of the plaintiff in error, the plaintiff below.

The defendant in error will further take notice that the plaintiff proposes to print and so designates the following portions of the record as sufficient to present the errors relied on in this cause, to wit:

1. The petition, except the verification and except the policy of insurance attached to the same.

2. The answer of the defendant, except the verification.

3. The reply of the plaintiff, except the verification.
4. The verdict of the jury.
5. The motion of the plaintiff for a new trial.
6. The entry overruling the motion and allowing the bill of exceptions.
7. The bill of exceptions and the exhibits thereto attached in full, except out of Exhibit 1 there is omitted and not intended to be printed paragraphs of fine print Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, and paragraph beginning with the expression "petroleum, rock, coal, kerosene" and ending with the expression "must be separately and specifically insured," being the last three paragraphs of the fine print; also omitting the names of the directors and the other printed matter on the back of the policy.

All the parts of the policy except those just designated as omitted are intended to be printed.

Also omitting from Exhibit No. 2 everything except from the beginning of the policy down to and including the expression
"privilege of making alterations and repairs" in the written portion of the policy; all of paragraph 9 of the fine print;
81 paragragh 13 of the fine print.

The parts of Exhibit No. 2 just designated are intended to be printed. All the rest of the policy, including the endorsements upon the back thereof, to be omitted.

8. The assignment of errors and prayer for reversal.

JOSEPH WILBY,
E. W. KITTREDGE,
Of Counsel for Plaintiff in Error.

Received copy of above this 14 July, 1887.
PAXTON WARRINGTON,
Of Counsel for Def't.

82 [Endorsed:] No. 326. United States Supreme Court. 1887, Oct. term. No. 943. Robert Hamilton *vs.* The Liverpool & London & Globe Insurance Company. Statements of error and suggestion of pl'ff in error of parts of record for printing. Joseph Wilby, E. W. Kittredge.

[Stamped:] Office Supreme Court U. S. Filed Jul- 16, 1887. James H. McKenney, clerk.

Endorsed on cover: S. Ohio C. C. U. S. No. 326. Robert Hamilton, plaintiff in error, *vs.* The Liverpool and London and Globe Insurance Company of Great Britain. Filed May 13, 1887.

SUPREME COURT OF THE UNITED STATES.

October Term, 1889.

I, B. R. Cowen, clerk of the United States circuit court for the southern district of Ohio, western division, hereby certify that I have compared the printed record in the case of Robert Hamilton, plaintiff in error, *v.* The Liverpool and London and Globe Insurance Company of Great Britain, defendant in error, No. 326 on the docket of the Supreme Court of the United States, October term, 1889, with the original pleadings, files, and record of the same cause, No. 3901 on the docket of the circuit court, in my office, and I find the following omissions and differences in the Supreme Court printed record, which, when supplied to and corrected on the said printed record, will make the same a correct transcript and copy of the record of the said cause as it appears in the records and files in my office:

1. The word "ten" to be substituted for the word "eight" before the word "thousand," in the fifth line from the end of the first paragraph or defense in the answer on page 2 of the printed record.

2. The word "appraised," in the fourteenth and fifteenth lines on page 3, should be "appraisal," and the word "and," in the fortieth line from the top, should be "any."

3. The words "specifically denies that the defendant requested the plaintiff" should be inserted after the words "and the plaintiff," in the eleventh line from the bottom on page 4 of said printed record.

4. The word "weight" to be substituted for the word "right," in the bottom line on page 5 of said printed record.

5. "No. 2," in the 17th line from the end of page 7 of the printed record, should be "No. 20."

6. The figure "1866," at the end of the 19th line from the end on page 7 of the printed record, should be "1886."

7. The word "as" should be inserted between the words "agents" and "they," in the 23rd line from the bottom on page 7 of said printed record.

8. The word "were" should be inserted between the words "that" and "objected," in the second line from the top on page 9 of the printed record.

9. Instead of Exhibit No. 7, as the same appears printed on pages 12 and 13 of said printed record, the following should be substituted as Exhibit No. 7, and Exhibit No. 7 as it appears printed in said record should be stricken out:

EXHIBIT No. 7.

(Inclosed in foregoing.)

Proof of Loss under Policy No. 2,907,224.

The undersigned, in compliance with the requirements of the policy of insurance as above, states—

First. That he has sustained loss and damage upon the property insured by fire occurring on the 16th day of April, A. D. 1886, and makes the following as particular an account of his loss and damage as the nature of the case will admit of:

Second. The property insured was owned by Robert Hamilton and all contained in the five-story brick building, being No. 417 Madison avenue, Covington, Kentucky.

Third. The buildings were occupied by the assured as a tobacco warehouse.

Fourth. The origin of the fire is unknown to the undersigned.

Fifth. The fire occurred in the rear part of the building 415.

Sixth. The actual cash value of the property insured at the time of the fire was as set forth in the invoice, hereto attached, showing the kinds and condition of the property, as to its being manufactured or unmanufactured.

Seventh. But a small portion of the property insured was entirely destroyed. The chief loss and damage was occasioned by the stock being saturated with smoke from the fire, and I estimate the amount of the loss at ten thousand dollars ($10,000), which I claim upon the whole property, and as against this company, under the above policy, the sum of five thousand dollars.

Eighth. At the time of the loss there was the following insurance upon the property, the written description of the property in each policy being as follows:

* * * * * * *

Inventory of Property in No. 417 *Madison Avenue, Covington, Kentucky, on April* 16, 1886.

65 hhds. (73,020 lbs.) leaf tobacco	$8,780	84
94 part hhds. (97,306 lbs.) leaf stems	10,396	11
	19,176	95
276 fine-cut pails	30	36
19 bbls., 5,687, gran. sugar, @ 6½	369	66
7 bbls., 2,345, N. O. sugar, @ 5¼	123	11
23 bbls., 7,650, clarified sugar	478	13
2 hhds. N. O., 2,340 lbs.	119	93
11 bbls. and cases licorice, 2,588 lbs.	248	69
4 bbls. gum, 1,189 lbs.	475	60
4 bbls. prunes, 835 lbs.	41	75
3 bbls. rum, 135 gal.	189	
Ins'ce, 10 M.	$21,253	18

10. The word "26th," on the fifth line from the end, on page 15 of said printed record, should be and read "28th."

11. The letter on page 17 of the printed record, dated April 28th, 1886, headed "joint correspondence," should be and be marked "Exhibit No. 12."

12. The letter on page 27 of the printed record, dated May 17th, 1886, together with Exhibit No. 24, following, on said page 27 and page 28, should be stricken out, and in their place should be substituted the following, as Exhibit No. 24:

"CINCINNATI, O., *May 5th*, 1886.

The Liverpool and London and Globe Ins. Co.

GENTLEMEN: Please find notice of the sale at public auction on May 15th, 1886, at the warehouse of B. F. Power, Nos. 54, 56, and 58 West Front street, Cincinnati, Ohio, of the tobacco of Robert Hamilton, removed from No. 417 Madison avenue, Covington, Ky., covered by your policy of insurance, in to-day's Enquirer and Commercial-Gazette.

Yours very truly, E. W. KITTREDGE."

(Enclosed in above.)

"For sale.

On the 15th day of May, 1886, at the warehouse of B. F. Power, Nos. 54, 56, and 58 W. Front St., Cincinnati, O., will be sold at public auction the stock, consisting of—

170,326 lbs. leaf tobacco and stems,
2,588 lbs. powdered and mass licorice,
835 lbs. prunes,
5,687 lbs. granulated sugar,
4,685 lbs. open-kettle N. O. sugar,
7,650 lbs. clarified N. O. sugar, and 276 fine-cut tobacco pails,

exposed in the warehouse of Robert Hamilton, No. 417 Madison ave., Covington, Ky., at fire occurring April 16, 1886.

Sale to commence at 9 o'clock a. m., to be continued from day to day thereafter until the entire property is sold."

In witness whereof I have hereunto set my signature and official seal this 22d day of April, A. D. 1890.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. O.,
By ROB'T C. GEORGI, *Deputy.*

Supreme Court of the United States. October Term, 1889.

ROBERT HAMILTON, Plaintiff in Error,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY OF GREAT BRITAIN, Defendant in Error.
} No. 326.

Stipulation.

It is hereby stipulated and agreed between the parties to the above-entitled cause that the printed record on file in the Supreme Court of the United States and the transcript from the circuit court in the same case, to wit, No. 326, October term, 1889, of the Supreme Court of the United States, may be supplemented and corrected and made to conform to the transcript of the case on file in the clerk's office of said circuit court by the foregoing certificate of B. R. Cowen, Esq., clerk of the said circuit court of the United States for the southern district of Ohio, western division, and in the matters, words, and figures as is in said certificate set forth, without recourse to suggestion of a diminution of the record or writ of certiorari.

Cin'ti, April 22, '90.

JOSEPH WILBY,
For Robert Hamilton, Pl'ff in Error.
CHANNING RICHARDS,
CHAS. H. STEPHENS,
For Def't in Error.

[Endorsed:] Sup. Court U. S. 1889, Oct'r term. No. 326. Robert Hamilton, pl'ff in error, *vs.* The Liverpool & London & Globe Ins. Co. Stipulation correcting transcript of record. Filed Apr. 25, 1890.

Office Supreme Court U. S.
FILED
APR 28 1890
JAMES H. McKENNEY
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 326.

ROBERT HAMILTON, *Plaintiff in Error,*

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, OF GREAT BRITAIN,

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio, W. D.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH WILBY.

KITTREDGE & WILBY,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No 326.

ROBERT HAMILTON, *Plaintiff in Error,*

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, OF GREAT BRITAIN,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error from the Circuit Court of the United States for the Southern District of Ohio, Western Divison.

The action below was upon policy of insurance against fire, No. 2,907,224, issued by the Liverpool and London and Globe Insurance Company, of Great Britain, presenting a controversy upon it and other policies of insurance aggregating fifty thousand dollars ($50,000)—$10,000 on warehouse, $40,000 on factory—upon a stock of tobacco and materials for manufacturing the same, damaged by exposure to smoke in the premises of Robert Hamilton, a manufacturer

of tobacco, in Covington, Kentucky, at a fire, April 16, 1886. These policies were in several different companies, and actions brought upon them at the same time with the case at bar are pending upon defenses raising substantially the same questions as presented in the present case; so that, both in fact and by stipulation between the parties, the whole controversy, involving the entire fifty thousand dollars ($50,000) of insurance, is presented in this action.

It became at once apparent to Mr. Hamilton that his damage, with the exception of a comparatively insignificant amount, was not by actual consumption by fire, but resulted from exposure to smoke for from eight to ten hours

The insurance companies, however, not only denied the fact of such exposure, but took the ground that the property was not, and could not have been, at all damaged by exposure to smoke, even assuming it to have been so exposed as claimed by Mr. Hamilton.

Thus there was disclosed at the outset a divergence of claim and contention between the insured and the insurers, measured by the entire amount of the insurance. Thereupon ensued negotiation between the insurance companies and Mr. Hamilton, conducted in part, on behalf of Mr. Hamilton, by E. W. Kittredge, beginning on April 23 and ending on June 7, 1886, which will be found set forth in the letters (Rec. pp. 9–29, inclusive, and being Exhibits 3–26, inclusive). As these letters, or some of them, will be more particularly referred to hereafter in the argument, a mere chronological statement of their substance is deemed sufficient here.

April 23, 1886 (Exhibit 3, Rec. p. 9), the defendant company, referring to Mr. Hamilton's claim of a total loss, notified him to conform strictly to the conditions of the policy in presenting claim for loss.

The next day (Exhibit 4) Mr. Hamilton notified the insurance company that he had put the property in order, and made an inventory thereof; that he proposed to sell the property at auction for the purpose of ascertaining its present value; that the presence of the damaged stock interfered with the prosecution of his business; that the property was ready for examination by the company; and inviting the company to make any examination of the property they saw fit.

The same day (Exhibit 6) the defendant company notified Mr. Hamilton of the form in which they desired proof of loss to be made, stating the company's unwillingness to consent to the sale of the property; but also stating that there would be no objection to Mr. Hamilton's removing the property, at his own expense, to where it could be readily inspected by appraisers.

On April 26 (Exhibit 7, not as in printed record, but as in stipulation), proof of loss, in the form indicated by the company, was transmitted to it by Mr. Hamilton; he again notified the company to make such examination of the property as it might desire, and repeated his purpose to sell the stock at public auction, after notice.

The next day (Exhibit 8) the defendant company acknowledged the receipt of such proofs of loss under the policy, but protested against the purpose to sell, as expressed by Mr. Hamilton, and demanded an appraisal of the stock by competent and disinterested parties.

The same day (Exhibit 9) Mr. Hamilton, through Mr. Kittredge, again called the attention of the defendant company to the injury to his business by delay, and again invited the insurance company to make whatever examination it wished of the property.

The next day (Exhibit 10) the insurance company wrote Mr. Kittredge, assigning as the reason for its protest and

objection to the sale of the damaged property that such a sale would deprive the company of the right which it had under its policy of taking the property at its appraised value; renewing the company's request for an appraisement, and giving notice that the sale of the property by Mr. Hamilton, as proposed, would be understood and accepted by the company as a relinquishment of all claims under the policy.

On the same day, the first letter of a joint correspondence was sent by all the companies insuring Mr. Hamilton (Exhibit 12, Rec. p. 17), demanding jointly the submission of the question of the value of the stock and loss thereon to competent and disinterested persons to be chosen as provided in the several policies of insurance; also protesting against the sale of the property as proposed by Mr. Hamilton.

On the next day (Exhibit 11, Rec. p. 16) Mr. Hamilton advised the defendant company that he would agree to submit the amount of the loss to arbitration by arbitrators, upon the express understanding that the arbitrators should have full opportunity to examine the tobacco, and that it should then be sold at public auction, and that its value thus ascertained, together with such other evidence as either party might desire to offer, should be presented to the arbitrators before they made their award.

On the same day Mr. Hamilton again (Exhibit 13) addressed substantially the same communication as last above mentioned, to Messrs. J. H. Law & Bro., on behalf of all the insurance companies, and as a reply to their joint communication to him.

The next day (Exhibit 14) all the insurers jointly advised Mr. Hamilton that such an arbitration as he proposed in his letter of the 29th of April (Exhibit 13) was incompatible, in their view, with the provisions of the several policies of in-

surance, and insisting on arbitration without any conditions as to the sale of the property.

The next day (Exhibit 15) Mr. Hamilton, addressing all the insurance companies, denied that the character of arbitration he had proposed was incompatible with the provisions of the several policies; averred his readiness to proceed at once with an arbitration; suggesting that the several policies so differed in their provisions upon the subject of arbitration that a literal compliance with some would be inconsistent with a literal compliance with others; and asked that the insurance companies define what they considered to be the arbitration called for in the policies, by submitting to him a form of agreement for arbitration. The letter also re-stated Mr. Hamilton's position in proposing to sell the property at public auction, and his view of the character of hearing that should be had before the arbitrators in arbitrating the loss as provided by the policies.

Thereafter, on the 3d of May (Exhibit 16, Rec. pp. 20 and 21), all the insurance companies addressed Mr. Hamilton a letter, inclosing a form of agreement for "submission to appraisers," claiming that it was in practical accordance with the conditions of the policies of the several companies, and that all of the companies were willing to abide by an award reached under it. It was again stated that the companies declined to submit to an arbitration such as proposed by Mr. Hamilton, by which the arbitrators, after examining the stock, should postpone their award until after the stock should have been sold, when the result of such sale, with other evidence, should be submitted to the arbitrators; and asserted that the insurance companies insisted that the arbitration provided for in their policies was in no sense a court for the hearing of evidence; but that the "appraisers" might, in their discretion, seek any evidence they might deem necessary

for their own information. The form of "submission to appraisers," including a form of declaration of "appraisers" and award of "appraisers," inclosed in this communication, may be found (Rec. pp. 21, 22).

The next day (Exhibit 17) Mr. Hamilton, in reply to this joint communication of May 3, stated to the insurance companies his understanding of the situation, saying, that as he (Mr. Hamilton) understood it, the insurance companies' position was that of demanding an "appraisement" by "appraisers," who should estimate the loss by their own judgment without hearing testimony of witnesses who might be called by either party, and that the parties should be bound by their report as to the amount of the loss. This, Mr. Hamilton stated, he declined to agree to. On the other hand (the letter went on to say), Mr. Hamilton was willing that the companies jointly, or as they might arrange between themselves, should make their own "appraisement" of the stock through their own "appraisers;" and that the companies might jointly, or either of them, have the right to take the stock in whole or in part at such "appraisement." The letter further repeated Mr. Hamilton's disclaimer, that the companies should consent to the sale by him of the damaged stock. And, finally, the letter inclosed a written demand by Mr. Hamilton upon the insurance companies, including the defendant company, for arbitration, which was in terms formally submitted to the several parties. To this demand for arbitration which was inclosed Mr. Hamilton prescribed that it should be stipulated in the agreement for arbitration that the companies and the assured should be duly notified of the time of the hearing by the arbitrators, and that the arbitrators should hear all competent legal testimony that might be offered by either party, as well as personally examine the goods, in arriving at their award.

The next day, May 5 (Exhibit 18), the companies replied, acknowledging the letter last above named, and stated that they would regard Mr. Hamilton's insisting upon a form of submission providing for testimony by either party as a refusal by Mr. Hamilton to comply with their request, and a refusal to comply with the conditions of the policies.

And on the same day, May 5 (Exhibit 24, not as in printed record, but as in stipulation), Mr. Hamilton sent the defendant notice of the proposed sale, on May 15, of the property damaged.

Thereafter, on the 7th of May (Exhibit 19), the last joint communication was sent to Mr. Hamilton by the insurance companies, saying that the companies' position as to the hearing of testimony of witnesses was, that the appraisers might, at their discretion, seek any evidence they deemed necessary; but that what the companies did object to and protest against was the sale of the goods or the consideration by the appraisers of the evidence founded on the result of that sale. The letter also stated that it was desired by each company to submit severally its own form for "submission to appraisers," and make separate demand therefor. Accordingly, on the next day (Exhibit 20), Mr. DeCamp, on behalf of the defendant company, demanded an appraisal of the goods insured under the policy, and inclosed a form of agreement of "submission to appraisers." This form of submission, which was inclosed, and the declaration of "appraisers" accompanying it, may be found Rec. p. 25, and are substantially like the forms jointly submitted (Rec. pp. 21 and 22).

Thereafter, on May 13 (Exhibit 22), the defendant company suggested to Mr. Hamilton the name of an appraiser to act for their company. The defendant company had apparently not yet availed itself of the repeated invitation by Mr. Hamilton to examine and appraise the property, for the same

letter concludes with notice to Mr. Hamilton that until an appraisal was had, the loss, if any, would not be payable.

On June 3 (Exhibit 25, Rec. p. 28), Mr. Hamilton notified defendant company that, pursuant to the notice of sale heretofore referred to, he (Mr. Hamilton) had disposed of the property at public auction. Furthermore, the company was then and there notified in this communication that, notwithstanding all that had previously been done and said by and between the parties, Mr. Hamilton was still ready to then submit the amount of loss to competent and impartial arbitrators, insisting only that in the agreement for submission it should be provided that the company and the assured should be notified of the time of the hearing of the arbitrators, and that the arbitrators should hear all competent legal testimony that might be offered by either party, and that a reasonable time should be prescribed within which an award should be rendered. The letter referred to Mr. Spear, whose name had been submitted by the company to Mr. Hamilton as "an appraiser;" and inquiry was made of the defendant company relative to his character as being competent and impartial, or otherwise.

Thereafter, on the 7th of June (Exhibit 26), the defendant company replied, acknowledging Mr. Hamilton's letter of the 3d of June, but claiming that the sale of the goods had rendered an appraisement impossible, and that thereby the company had been deprived of their right to take the property at its appraised value; and that the defendant company regarded such sale of the goods as a refusal to accede to the company's demand for submission of the differences in question. The letter did not attempt to state any general or specific objections to, or reasons for, refusal of the offer and demand for arbitration by Mr. Hamilton, of June 3, but proceeded in its closing sentence to say, that, as Mr. Ham-

ilton had, in the judgment of the company, waived any rights he may have had under the policies, the defendant company would stand upon its legal rights.

This naturally closed the correspondence and all further negotiation.

And thereafter, in July, 1886, Mr. Hamilton brought suit against all the companies insuring him, including the defendant company, in the Circuit Court of the United States for the Southern District of Ohio, reciting in his petition (Rec. pp. 1 and 2) the effecting of the insurance under the said policy in the defendant company, the fire, notice thereof to the defendant, the delivery of due proof of loss, other insurance upon the same property, and claiming to recover five thousand dollars ($5,000), the amount of the policy, with interest from the 16th of April, 1886, the date of the fire.

To this petition the defendant company answered (Rec. pp. 2–4, inclusive), setting up three defenses—First: Admitting the execution of the policy and the fire as alleged, but denying the destruction or damage as alleged by the plaintiff; also denying that the plaintiff had done and performed all the conditions in said policy contained, on his part to be kept and performed.

Second: As a second defense defendant alleged that it (defendant) had requested plaintiff in writing that the differences between them as to the amount of loss or damage be submitted to competent and impartial persons as provided in the policy, but that plaintiff refused so to do, and did not permit an appraisal to be made in accordance with the provisions of the policy, and no award had been obtained fixing the amount of plaintiff's claim; and that, therefore, the loss sustained by the plaintiff was not payable, and the action could not be sustained.

[As the language of the policy set forth in this defense as

containing the provisions upon which it is grounded, will be hereafter in the argument quoted at length, it is for brevity omitted here.]

Third: As a third defense the defendant alleged the right of the defendant, under the policy, to take the property at its appraised value, and that, differences as to the amount of the loss having arisen, defendant requested an appraisement; but that plaintiff had sold and removed all the property insured, and had deprived the defendant of the right to have an appraisal made of the property and to take the same at its appraised value, and that thereby plaintiff had waived his right to recover under the policy.

The plaintiff replied (Rec. p. 4), admitting the allegation in the answer that the chief loss and damage claimed was occasioned by the stock being saturated with smoke, but specifically denying that the defendant requested the plaintiff that the amount of the loss be submitted to competent and impartial persons as provided in the policy, and specifically denying that the plaintiff refused so to do; denying that the plaintiff did not permit an appraisement to be made in accordance with the provisions of the policy; and averring, on the contrary, that the plaintiff demanded in writing that the amount of the loss sustained should be submitted to arbitration as provided in said policy and that the defendant refused so to submit the same; and denying that the plaintiff had in any manner waived his right to recover under the policy.

With issues so joined, the cause came on for trial before the Court and a jury at the February term, 1887; and, as appears by the bill of exceptions (Rec. pp. 6, 7, and 8), the plaintiff offered in evidence the policy in suit (Exhibit 1, Rec. pp. 28–32, inclusive), and evidence of its execution and delivery and the payment of the premium thereon as alleged;

also evidence of loss under the policy by fire on April 16, 1886; and that plaintiff furnished proof of said loss to defendant as provided by the terms of said policy; also evidence tending to prove the amount of said loss or damage by fire, and that the same was a total loss, and that the property insured was greater in value than the amount of said policy, and that said loss was occasioned by exposure to smoke of the property insured for from eight to ten hours, whereby said property became saturated and impregnated with smoke, and greatly impaired and damaged. Plaintiff also offered in evidence the policy of insurance on the same property in the North British and Mercantile Insurance Company (Exhibit 2, Rec. pp. 33–36, inclusive), and rested.

And defendant offered evidence of the amount of the loss, and read in evidence the correspondence heretofore referred to (Exhibits 3–26, inclusive), and rested.

And that being all the evidence offered by either party upon the issues joined on the second and third defenses of defendant's answer, and the reply of the plaintiff thereto, the Court then charged the jury that upon the issues joined upon the second defense of defendant's answer the defendant was, upon the evidence, entitled to a verdict, and the plaintiff could not recover, to which plaintiff excepted; and that it appeared from the evidence (that is, the letters, Exhibits 3—26, inclusive), that the defendant requested the plaintiff in writing that the amount of plaintiff's loss under his policy be submitted to competent and impartial persons as provided in said policy, but that plaintiff refused so to do, to which plaintiff excepted. The Court also charged the jury as follows (Rec. p. 8):

> "That it appeared from the evidence that prior to the commencement of this suit the defendant company

had requested, in writing, of the plaintiff that the question of the amount of loss or damage to the property covered by the insurance policy be submitted to appraisers selected in the manner provided in the policy, at the same time insisting that such appraisers should, in their discretion, seek any evidence they deemed necessary for their own full information and the forming of their own judgment as to the value and damage to the goods, and that thereafter, in answer to such request and prior to the commencement of this suit, the plaintiff refused to agree to submit the said question of the amount of loss or damage to appraisers, who should estimate the loss by their own judgment without hearing the testimony of witnesses who might be called by either party, but expressed his, the plaintiff's, willingness to submit the question of the amount of loss to competent and impartial arbitrators, provided that in the agreement for submission it should be provided that the defendant company and the plaintiff should be notified of the time of the hearing of the arbitrators, and that the arbitrators should hear all competent legal testimony that might be offered by either party, and that a reasonable time should be prescribed within which an award should be made; that thereby the defendant had requested of the plaintiff, and the plaintiff had refused to submit the question of the amount of loss or damage under the policy to competent and impartial persons in the manner and as provided by the terms of the policy as set up in the second defense of defendant's answer."

To which plaintiff excepted.

And the Court further instructed the jury to return a verdict in favor of the defendant. To which plaintiff excepted. (Rec. p. 8.)

To the charge, as a whole and to each portion of it, the plaintiff then and there excepted.

To the offer by the defendant of Exhibits 16–20 (Rec. pp. 20, 21, and 25), being the form of submission to appraisers demanded and submitted by the defendant, the plaintiff objected, as not tending to establish a demand for the arbitration provided in the policy, and excepted to the ruling of the Court admitting the same.

The jury having under the instruction of the Court as aforesaid returned a verdict for the defendant, the plaintiff within three days filed his motion for a new trial (Rec. p. 5), for the reasons, among others as therein specified, that the Court erred at the trial in admitting evidence offered by the defendant, and erred in its charge to the jury; which motion was overruled, and the bill of exceptions allowed, signed, and made part of the record, setting forth the evidence, the rulings and charge of the Court, and the exceptions of the plaintiff thereto, as above specified. (Rec. pp. 6–8, inclusive.)

The formal assignment of errors and prayer for reversal, returned with the writ of error, is part of the record in the Court below, and may be found on page 38 of the printed record; and the particular question sought to be presented arises upon the charges of the Court directing a verdict for the defendant upon the special defense raised by the second defense of defendant's answer and the reply of the plaintiff thereto.

ARGUMENT.

No. 2907224. $5000.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

NEW YORK:
WILLIAM STREET.

LIVERPOOL:
I, DALE STREET.

LONDON:
CORNHILL & CHARING CROSS.

CINCINNATI GENERAL AGENCY—J. M. DECAMP, GEN'L AGENT.

THIS POLICY OF INSURANCE WITNESSETH, that *Robert Hamilton, Esq.*, having paid to THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY the sum of *fifty dollars* for the insurance against loss or damage by fire, (subject to the conditions and stipulations which constitute the basis of this insurance), of the property hereinafter described, to the amount hereinafter mentioned, not exceeding upon any one article the sum specified on such article, namely: *five thousand dollars on his tobacco in hogsheads, his own held in trust on commission, or sold, but not delivered where he may be legally liable; contained in the three-story metal roof brick building, known as the "Kenton Tobacco Warehouse," situated Nos.* 212, 214, 216, 218, 220, *Greenup Street, Covington, Ky. Other insurance permitted.*

The two directors of the said Company, whose names are hereunto subscribed, do hereby agree that, from the *fifth* day of *September*, 1885, at twelve o'clock noon, until the *fifth* day of *September*, in the year of our Lord *one thousand eight hundred and eighty-six*, at twelve o'clock noon, the funds and property of the said Company shall (subject to the following conditions and stipulations which constitute the basis of this insurance), be subject and liable to pay, reinstate, or make good to the said assured, —— heirs, executors, or administra-

tors, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured, not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property.

TERMS AND CONDITIONS UPON WHICH THIS POLICY IS ISSUED:

1. If an application, survey, plan or description of the property herein insured is referred to in this Policy, such application, survey, plan or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the Company written hereon, or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain without notice to, and consent of, this Company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this Company indorsed hereon; or if it be a manufacturing establishment running in whole or in part over or extra time, or running at night, or if it shall cease to be operated without special agreement indorsed on this Policy; or if the property be sold or transferred, or upon a passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the property insured be assigned under any bankrupt or insolvent law, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance; or if this Policy shall be assigned before a loss, without the consent of the company endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this Policy; or if the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit-gas, or any burning fluid, or chemical oils, without written permission in this Policy, then, and in every such case, this Policy shall be void.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models or curiosities, unless particularly specified in this Policy. This Company shall not be liable by virtue of this Policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder or any explosive substance; nor by lightning or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

The use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and endorsed on this Policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

3. If a building shall fall, except as the result of a fire, all insurance by this Company on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the Company, and so expressed in the written part of this Policy, otherwise the Policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. If, during this insurance, the above-mentioned premises shall be used for any trade, business or vocation, or for storing, using, or vending therein any of the articles, goods, or merchandise, denominated hazardous, or extra hazardous, or specially hazardous; or if the occupation of such premises be changed from one of the class denominated extra hazardous or specially hazardous to that of another of the same class, except as herein specially agreed to in writing upon this Policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this Policy shall cease, and be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do, this company will not be liable for damage caused by such failure; and there can be no abandonment to the Company of property insured.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this Policy, the assured shall be entitled to recover of this

Company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon, without reference to the dates of the different policies, or their invalidity, from want of notice of this or other insurance, or from the violation of any of their conditions, or the insolvency of any or all the other insurance companies. And it is hereby declared and agreed that in case of the assured holding any other Policy in this or any other Company on the property insured, subject to the conditions of average, this Policy shall be subject to average in like manner.

8. This insurance may be cancelled at any time at the request of the insured, in which case the Company shall retain only the customary short rates for the time the Policy has been in force; it may also be cancelled at any time by the Company, on giving notice to that effect and tendering a ratable proportion of the premium for the unexpired term of the Policy. It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by this Company, shall be deemed to be the agent of the assured named in this Policy, and not of this Company, under any circumstances whatever, or in any transaction relating to this insurance.

9. This insurance, the risk not being changed, may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this Policy, or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the Company by the assured at the time of renewal, this Policy and renewal shall be void.

CONDITIONS RELATING TO THE METHODS OF ADJUSTMENT OF LOSS AND THE PAYMENT THEREOF:

10. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the Company, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a Magistrate or a Notary Public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such Magistrate or Notary Public shall certify. The assured shall, if required, submit to an examination, or examinations under oath, by any person appointed by the Company, and subscribe to such examinations when reduced to writing, and shall also produce their books of accounts and other vouchers, and exhibit the same for examination at the office of the Company, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this Policy, damaged or not damaged, for examination to any person or persons named by the Company, and as a part of the preliminary proofs of loss, the assured shall, if the claim be for building destroyed by fire, procure the duly verified certificate of some reliable and responsible builder, in detail, as to the actual cash value of it immediately before said fire, which shall be attached to and form a part of such proofs, and, if required so to do, shall furnish the Company with plans and specifications of the buildings destroyed, which shall be duly verified by the oath of the assured.

When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the Company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value, and of the loss or damage, shall be determined by agreement between the Company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing, concerning, or arising out of, this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them, in case of their disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this Company, and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the Company of the property insured, but the Company reserve the right to take the whole, or any part thereof, at its appraised value; and, provided further, that it shall be optional with the Company to repair, rebuild, replace or restore the property lost or damaged, within a reasonable time, giving notice of their intention so to do within thirty days after the receipt of the proofs herein required.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this Policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this Company under this Policy.

11. It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this Company, for the recovery of any claim by virtue of this Policy, shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

☞ *Petroleum*, rock, earth, coal, kerosene, or carbon oils of any description, whether crude or refined, benzine, benzole, naphtha, camphene, spirit-gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission endorsed on this Policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight. Otherwise this Policy shall be null and void.

☞ *Builders' Risk.*—The working of carpenters, roofers, tin-smiths, gas-fitters, plumbers, or other mechanics, in building, altering, or repairing the premises named in this Policy, will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

☞ *Frescoed-work* or guilding on walls or ceilings, *glass* in doors and windows, exceeding the dimensions of nine square feet, *fences* and other yard fixtures, *stove furniture and fixtures*, including shelving and counters, and *awnings* and signs are not covered by insurance on the *building*, but must be separately and specifically insured.

☞ *By accepting this Policy the assured agrees to become bound by its terms and conditions.*

In Witness Whereof, we, two of the directors of the said company, have hereunto set our hands and seals this *fifth* day of *September*, in the year of our Lord *one thousand eight hundred and eighty-five.*

But this Policy shall not be valid until countersigned by the duly authorized agent of the company at *Covington, Ky.*

CHARLES H. MARSHALL. [SEAL.]
ROBT. B. MINTURN. [SEAL.]

Examined ——.
Entered ——. Countersigned:
JNO. P. HARBICK, *Agent.*

ENDORSEMENT SLIP.

[ANSWER QUESTIONS ON BACK IF A REMOVAL.]

Use this only to report Amendments, Transfers, Partial Cancellations, or Rebates made on Policies.

LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY,

J. M. DECAMP, General Agent, Cincinnati.

No. of Policy, 2907224. Old rate _____
No. of renewal _____ New rate _____
3

Hazard _____ Expires *September 5th*, 1886.
Amount insured, $5000. Old location _____
Endorsement dated *March 6th*, 1886.
Name of assured, *Robert Hamilton, Esq.*

Transferred to cover leaf and manufactured tobacco, and material making the same, contained in the third, fourth and fifth floors and cellar of the five-story brick warehouse building, situated No. 417 *(west side) Madison Street, Covington, Ky. Risk ceasing at former location from date hereof.*

Additional premium, $——.
Return premium, $——.

JNO. P. HARBICK,
Agent at Covington, Ky.

Such (reproduced in fac-simile) is the contract of insurance entered into by Mr. Hamilton. The obscurity of the fine print contains the language by which defendant company, in its special defenses, seeks to avoid the obligation of its contract.

I.

It is admitted that Robert Hamilton in good faith procured and paid for his insurance; the fire is admitted; no bad faith is charged against plaintiff at any stage of his dealings with the defendant. His property is gone. His indemnity by insurance on that property the Court below swept away by holding that he forfeited his rights under the policy, saying that he refused to submit the question of the amount of his loss to "arbitration according to the terms of the policy."

Our contention is, that he did not so refuse; that in charging the jury that he did refuse, the Court below erred.

The controversy, and line of difference between plaintiff and defendant, over the meaning of the contract, defined

itself at the earliest interview after the loss, and continued marked throughout the entire correspondence and negotiation.

The insurance company, by taking issue with Mr. Hamilton on the possibility of damage to his stock by exposure to smoke, sought to lay the ax at the root of its liability on the policy, as effectually as if it had expressly repudiated the validity of its contract.

Confronted with this threat of its intention to avoid paying the insurance by ignoring and dwarfing the damage, Mr. Hamilton was put upon his guard against any scheme of estimating his loss which should leave him at the mercy of inadequate, fortuitous, or ill-considered reckoning.

He therefore notified the company that he proposed to get evidence of the value of his damaged tobacco by selling it at public auction, after giving to the company ample opportunity to make such examination thereof as it saw fit.

The mistake the company made, by which it reached an untenable position in this negotiation, was in assuming the option to take the stock at its appraised value to be a condition of the risk going to the essence of the plaintiff's right of recovery.

In so assuming, it naturally regarded the sale proposed by Mr. Hamilton as, in their view, such a violation of the contract as would put Mr. Hamilton beyond its protection.

It was, therefore, upon this theory that the company repeatedly advised plaintiff that by such sale, and its consequent destruction of the right of the company to take the property at its appraised value, he had waived all rights under the policy.

> "As you have in spite of our protest sold and scattered the goods, so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take the property,

> or any part thereof, at its appraised value, * * * Mr. Hamilton has, in our judgment, waived any rights he may have had under the policies, and this company will stand upon its legal rights in the premises." (Exhibit 26, Rec. p. 29.)

But the language providing for such privilege of taking at the appraised value is not a condition precedent. It could entitle the company to no more than a cross-action for damages for its breach.

Suppose, after an arbitration and award had, the plaintiff had simply refused to let the company take the property at its appraised value, would his right to indemnity for the loss thus ascertained have been paralyzed by such refusal? And yet that is the argument.

The North British Company (Exhibit 2, Rec. pp. 33, 34) reserved the same right to take at the appraised value. It is not unreasonable to claim that the same property could not be thus "taken" but once. And yet the policies permitted other insurance. (Rec. pp. 30, 33.)

The opportunity to appraise the property, if the company saw fit to do so, is not disturbed by the execution of the plaintiff's purpose subsequently to sell the property after proper notice thereof.

The company suggested the ascertainment of the damage by an "appraisal" by "competent and impartial persons" mutually selected, whose decision should be final and binding.

An "appraisal" differs from an "arbitration" in this important particular, among others—that "appraisers" are supposed to use their own senses, skill, and judgment, and these alone without evidence, in fixing values. It is essentially an ex-parte proceeding, requiring neither the presence of the parties or witnesses, nor notice to them of the time or place of the meetings of the appraisers.

An arbitration, on the other hand, implies, the right of the parties to the controversy to be notified of, and be present at, the meetings of the arbitrators pending the arbitration, and the right to offer evidence and the testimony of witnesses before the arbitrators, upon which, as well as upon their own judgment, the arbitrators shall make their award.

Arbitration is a tribunal—a kind of trial—agreed to by the parties and substituted for the courts of law; and like all civilized tribunals, it permits a day in court and a right to present evidence.

It was the interest of the company to prefer for this (to all outward appearance—undamaged) tobacco a valuation founded on a "guess," rather than the dangerous revelations of truth to be brought out by evidence.

The company therefore supplemented the natural import of the name of the character of proceeding by which it demanded the property should be valued, by expressly describing it as one which should be "in no sense a court for the hearing of evidence" (Exhibit 16, Rec. p. 21), whereas, arbitration is a court in every material sense. And again saying in its letter of May 7 (Exhibit 19, Rec. p. 24), "the appraisers may, at their discretion, seek any evidence they deem necessary for their own full information;" thus making it unmistakably clear that in demanding of Mr. Hamilton an "appraisement" by "competent and impartial persons as appraisers" it was making no ambiguous or equivocal use of these terms, but meant them in their proper, natural sense, as excluding the privilege of either party to offer evidence or testimony of witnesses as a matter of right. The eyes and senses of three appraisers were, by the company's demand, to be conclusive tests of the taint or damage in the tobacco and other stock in question. A guess—a jump in the dark.

The language of the policy not being such as to force upon

him such a method of valuation, Mr. Hamilton was unwilling to agree to a submission of that avowed character.

Mr. Hamilton consented to submit—he urged and requested the submission of the amount of damage—to arbitration by arbitrators, with notice to both parties of the time of the hearing by the arbitrators, and with the right of either party to offer competent legal testimony, as well as a personal examination by the arbitrators of the damage to the goods, in considering and awarding the amount of the loss. (Rec. p. 23.) (See formal demand inclosed in letter of May 4, Exhibit 17, Rec. pp. 22, 23.)

The earlier suggestions of Mr. Hamilton for such an arbitration insisted upon a postponement of the award until after the sale at auction, as proposed, in order that the values thus ascertained by the sale might be offered in connection with other testimony as to the amount of damage.

On June 3 (Exhibit 25, p. 28), Mr. Hamilton repeated his demand for and assented to arbitration, insisting only that in the agreement for submission,

> "It shall be provided that the company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered."

The answer to this offer is as follows (Exhibit 26, Rec. p. 29), and is the last word on the subject:

> CINCINNATI, June 7, 1886.
>
> E. W. KITTREDGE, ESQ., city:
>
> DEAR SIR—Your favor of 3d is at hand, in which you in effect inform us that Mr Hamilton has disposed of his stock claimed to have been damaged in the fire

of April 16, and that if we really desire it, he is willing to agree to an arbitration wherein the agreement shall provide that the arbitrators shall hear all legal competent legal testimony that may be offered by either party.

As you have in spite of our protest sold and scattered the goods so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take the property, or any part thereof, at its appraised value, we must accept your action as a refusal to accede to our demand for a submission of the differences that have arisen between us.

By the course pursued, Mr. Hamilton has, in our judgment, waived any rights he may have under the policies, and this company will stand upon its legal rights in the premises. Very truly,

J. M. DeCamp, G. A.

It will be observed that the company does not show any desire to bring about the arbitration. But it shuts the door on further negotiation; and declaring war, expressly remits Mr. Hamilton to the courts for redress, saying, "this company will stand upon its legal rights in the premises."

How can it be said, in the face of this, that it is *Mr. Hamilton* who prevented the consummation of an award and precipitated the resort to legal proceedings?

As cause for thus repudiating its policy the company says: "You have, in spite of our protest, sold and scattered the goods so that an appraisement within the terms of our policies is now impossible" (Exhibit 26).

As repeated invitation and continuous opportunity for a month was extended to the company to examine the property before it was sold, it is solely the fault of the company that an ex-parte appraisement was not obtained; and as to an arbitration by "competent and impartial persons," the presence

of the property before the arbitrators might have been sufficiently had if the parties had only agreed as to whether by "competent and impartial persons" was meant appraisers or arbitrators.

Again, one of the objections of the company was to any provision in the submission limiting the time within which the award should be made. And yet the contention, in effect, now is, that the damaged goods should have been stored and kept together (at Mr. Hamilton's expense) until the award—that is, indefinitely. "We can not consent to its removal, unless it be at your own expense. It should, if possible, be left where it is, though there can be no objection to your removing it to some other warehouse at your own expense." (Exhibit 6, Rec. p. 11.)

Having called attention to the difference between the form of submission insisted upon by the company on the one hand and that insisted upon by Mr. Hamilton on the other, the distinction being between an *appraisement* in which the right to offer evidence as to value and extent of damage is denied, and an *arbitration* in which the right to offer such evidence is secured, let us turn to the language of the policy out of which this controversy grows. It is as follows (Rec. p. 31):

> "The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award, in writing, of any two of them shall be binding and con-

clusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company, and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole or any part thereof at its appraised value; and provided further, that it shall be optional with the company to repair, rebuild, replace or restore the property lost or damaged within a reasonable time, giving notice of their intention so to do within thirty days after the receipt of the proofs herein required.

* * * * *

"11. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

Two words strongly tend to determine the character of the "competent and impartial persons" to be that of arbitrators; they are *umpire* and *award.*

Bouvier's Law Dictionary, title, arbitrator:

"Usually a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation that if they

do not agree another person, called an umpire, named or to be selected by the arbitrators, etc."

Webster :

"Award, specifically, the decision of arbitrators in a cause submitted."

Worcester :

"Award, the judgment of an arbitrator or arbitrators."

Bouvier is cited with approval in *Gordon* v. *United States*, 7 Wall. 188–194, as follows:

"An arbitrator is defined as 'a private extraordinary judge, chosen by the parties who have a matter in dispute, invested with power to decide the same.'"

Burrill's Law Dictionary, title, "Award :"

"The decision by arbitrators is an award."
"Competent and impartial persons · · · shall select an umpire, · · · and the award," etc.

This makes, we submit, an agreement for arbitration, not for appraisement. If so, Mr. Hamilton was entitled to decline appraisement by appraisers, and insist upon the hearing of evidence and notification of the time and place of hearing, which are incidents of arbitration. Just such language was held to provide for a common-law arbitration in *Nurney* v. *Fireman's Fund Ins. Co.*, 53 Mich. 633–637.

For the distinction between arbitration and appraisement or valuation, see *Redman on Awards*, p. 1.

In *Canfield* v. *Watertown Fire Ins. Co.*, 55 Wis. 419, the clause was as follows:

"If differences of opinion should arise between the parties hereto as to the amount of loss or damage, the

> subject shall be referred to two disinterested and competent men, each party to select one (and in case of disagreement, they to select a third), who shall ascertain, estimate, and appraise the loss or damage, and their award in writing shall be binding on the parties hereto, each party paying one-half the expense of reference."

This language was held to provide for an arbitration subject to the rules either of common-law arbitration or arbitration according to the statutes of Wisconsin.

The provision that the two competent and impartial persons selected were, if necessary, to select an *umpire*, and they were to make an award, is in itself sufficient to determine the meaning of the submission provided for in this language of the policy to be to arbitrators and not to appraisers.

Naturally, the insurance company, in any case, would prefer an appraisement and a submission without evidence; but especially in this case, where, in the language of *Wood on Fire Insurance*, Sec. 499 (Edition of 1878),

> "the goods, although left intact and apparently not seriously injured, are, nevertheless, rendered worthless for the purposes for which they were designed, either by the action of heat, smoke, water, or other cause, of which fire is the proximate cause,"

would the company prefer to interpret the language in question to mean a submission without evidence other than the senses of the appraisers.

But the rule is, that ambiguous language should be taken more strongly against the insurance company.

Wood on Fire Insurance, Vol. 1, Sec. 60:

> "It is the duty of the insurer to clothe the contract in language so plain and clear, that the assured

> can not be mistaken or misled as to the burdens or duties thereby imposed upon him. Having the power to impose conditions, and being the party who draws the contract, he must see to it that all conditions are plain, easily understood, and free from ambiguity."

In the language of *Anderson* v. *Fitzgerald*, 4 H. of L. cases, 484, the language of the policy

> "Ought to be so framed that he who runs can read."

For, as said by Wood *supra:*

> "Failing to employ a clear and definite form of expression, the benefit of all doubts will be resolved in favor of the assured. * * * A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the feet of the unwary, and, if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed to favor the assured."

So in *May on Insurance*, 204:

> "The spirit of the rule is, that where two interpretations equally fair may be given, that which gives the greater indemnity shall prevail."

In *Mark* v. *National Fire Insurance Co.*, 24 Hun. 565, a case affirmed by the Court of Appeals, 91 N. Y. 663, the presiding judge used this language (page 567), which commends itself to experience:

> "It is often said by courts that parties can make such contracts as they choose, and therefore must abide

by them. This is good in theory, but not in practice. Men can not make such contracts as they please with insurance companies, but are obliged to accept such contracts as the companies draw up. The necessities of life almost require a prudent man to insure. But for the terms of the contract the insured is at the mercy of the company. And policies are full of conditions, of which the insured knows nothing, until he suffers a loss."

Indulging in the assumption that Mr. Hamilton knew, when he accepted this policy, that there was a recital in the fine print that in case of loss and difference as to the amount thereof the question should be submitted to competent and impartial persons, who should select an umpire and make an award, we submit that it is not fair to suppose that he understood thereby that he was agreeing to leave such question of amount of damage to the precarious chance of the sense of smell or sight of appraisers, and to be bound by their report. The subject-matter of the insurance—the tobacco and materials for manufacturiug the same—was, of course, known to Mr. Hamilton to be susceptible to latent and evasive taint by exposure to smoke in case of fire. The right to arbitration by arbitrators of damage to such a subject-matter would be of vital interest to the insured; for, otherwise, and without proper opportunity to offer competent evidence on the subject, the entire value of his indemnity would be in danger of being compromised or speculated away by appraisers, without opportunity of being heard.

It is pertinent to this discussion to inquire whether it is reasonable that Mr. Hamilton would, for an *appraisement*, have bartered away his right to go into court for the *settlement* of differences with the insurance companies.

In *Wallace* v. *German American Insurance Co.*, 4 McCrary

123, Judge McCrary, in construing a policy similar to the one in suit, says (page 124):

> "It is undoubtedly competent for the parties to a contract to agree that damages claimed by either party under it shall be ascertained by an arbitration, and that no suit shall be brought until after such an arbitration has been had; but a contract which is intended to deprive the parties to it of the right of an appeal to the courts for redress, or to place conditions and limitations upon that right, should be strictly construed. * * * If the language employed in the policy leaves the question in doubt, the construction placed upon it and acted upon by the assured is to be upheld. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary. * * * * As the insurance company prepares the contract and embodies in it such conditions as to it seems proper, it is in duty bound to use language so plain and clear that the insured can not mistake or be misled as to the burdens and duties thereby imposed upon him."

So, in *Western Insurance Co.* v. *Cropper*, 32 Pa. St. 351, in construing a policy, the Court say:

> "If it be obscure, it is their (the insurers') fault; if it be capable of two interpretations equally reasonable, that must be adopted which is most favorable to the assured, for the language is that of the insurers."
>
> *Hoffman & Place* v. *Ætna Fire Insurance Co.*, 32 N. Y., 405.

If, then, the language of the policy providing for a submission to "competent and impartial persons" who shall make an "award," means, when properly interpreted, a submission to "arbitrators," then Mr. Hamilton never agreed to submit the question of the amount of his damage to "apprais-

ers," and in refusing to accede to such a submission he has violated no term of his contract. Yet, the Court below charged the jury that in refusing to submit it to "appraisers" (and that too when the demand for it was accompanied by the distinct avowal of the insurance company that it was to be in no sense a Court for the hearing of witnesses, thus proclaiming in advance the objectionable and limited character of the submission they were demanding), Mr. Hamilton waived and forfeited all rights under the policy, and took his loss upon his own shoulders. If it be arbitration that is provided for in this policy and in the language set forth in the second defense in the defendant's answer, as it undoubtedly is, then, in demanding "that in the agreement for submission it shall be provided that the company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered" (Exhibit 25, Rec. p. 28, Hamilton to Ins. Co., June 3, 1886), Mr. Hamilton was insisting upon no condition not properly and legally incident to *every* arbitration before arbitrators.

> Arbitrators "are bound within a reasonable time to render an award."
>
> *Morse on Arbitration and Award*, 225.

> "Each party is not only entitled to present his own case, both by evidence and argument before the arbitrators, but he is also entitled to be present whenever witnesses or arguments are heard by or on behalf of his opponent. Hence arises the necessity that each party should have notice of the time and place appointed for hearing."
>
> *Idem* 117.

It is the duty of an arbitrator "to hear all evidence material to the case, which is offered."

Idem 142.

"The duty of an arbitrator is to summon the parties before him, and take the evidence which they shall adduce, and make his award upon and according to the evidence. Though the matters referred may almost tell their own tale, the arbitrator must not make his award without calling the parties before him.

Redman on Awards, 127.

Consider the situation with reference to this loss. The damage was by smoke; an inspection or examination of the stock itself told little, if anything, of the extent of damage it had sustained; it of course told nothing of the length of time to which it had been exposed to the smoke; without evidence as to the length of time that it had been so exposed, which could only be furnished by witnesses, Mr. Hamilton's loss would almost inevitably be misjudged. A dry atmosphere, or a sense of smell in the appraisers even temporarily impaired at the time selected for appraisal, would, in the absence of the right to call witnesses, result in a disastrous underestimate of damage to Mr. Hamilton. The necessity for insisting upon the safeguard of witnesses and the right to call them, usual in arbitrations by abitrators, was peremptory for the interests of Mr. Hamilton.

"*Duty of the arbitrator to hear the evidence.* The arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury."

Russell on Awards, 6th edition, 192.
Van Cortlandt v. *Underhill*, 17 Johnson 405.

We quote the language of Chief-Justice Spencer, pages 410, 411:

> "It is useless to multiply authorities on this point, as the principle can not be controverted, that, for misbehavior in the arbitrators in refusing to hear material testimony, an award will be set aside in equity. The principle is so fundamentally just, that it requires no adjudged cases to support it. How are the arbitrators to do justice between the parties, if they refuse to avail themselves of the only means, the testimony of witnesses, to arrive at an honest and conscientious result? It is true, the arbitrators are judges of the parties, choosing, and I would do nothing to discourage arbitrations: It is a cheap and peaceful method of settling disputes."

> "It is essential to the fair and satisfactory investigation of facts that the opportunity should be afforded to obtain and produce the necessary evidence."
>
> *Passmore* v. *Pettit*, 4 Dall. 271.

Canfield v. *Watertown Fire Ins. Co.*, 55 Wis. 419.

In the Wisconsin case, under language providing for the submission of the question of the amount of loss or damage to "disinterested and competent men," a submission was had, and the arbitrators refused the plaintiff the right to introduce any evidence; as to which the Court say (page 425):

> "As to the exclusion of evidence. Whether the submission and award are ruled by the statute (R. S. 892, Ch. 153), or whether they constituted merely a common law arbitration, we are of the opinion that the plaintiff was entitled to introduce evidence to the arbitrators of the amount of his loss. If the proceeding was ruled by statute (as counsel for the defendant maintained in his argument), the exclusion of evidence violated a plain provision of Section 3549, which is

> that 'all of the arbitrators *must* meet together and hear all the proofs and allegations of the parties.' If this was merely a common-law arbitration, the right of the plaintiff to introduce evidence pertinent and material to the issue is quite clear. (*Morse on Arb. and Award*, 142 *et seq.*, and cases cited.) Whether it be a statutory or common-law arbitration, the exclusion of proper testimony is fatal to the award. * * * * We do not intend to say that it is not competent for parties to an arbitration so to frame the submission that the arbitrators may decide the controversy upon their own judgment and observation without resort to evidence aliunde, but here we have no such submission."

The policy in the case at bar is almost identical in the terms of its arbitration clause with the case just quoted.

In the matter of the arbitration between *Thomas William Brooke and others*, 16 C. B., N. S. 403, it was decided that, although mercantile arbitrators are not bound by the strict rules of evidence, yet they can not be permitted to transgress that fundamental principle of justice which declares that no man shall be condemned, either civilly or criminally, without being afforded an opportunity of hearing the evidence adduced against him and offering his defense. The difference was as to the condition of, and the amount to be paid under a warranty for, a cargo of rape-seed, submitted by agreement to arbitration. Chief-Justice Earl uses this language in his opinion (on page 414):

> "It is one of the first principles in the administration of justice, that the tribunal which is to decide must hear both sides, and give both an opportunity of hearing the evidence upon which the decision is to turn. * * * * I find that the master minds of every century are consentaneous in holding it to be an indispensable requirement of justice that the party

> which has to decide shall hear both sides, giving each an opportunity of hearing what is urged against him. * * * * Parties may undoubtedly, by agreement, warrant any course of proceeding they think fit: but here the agreement is that any dispute shall be settled by arbitration 'in the usual way.' That can not mean to sanction a usage which is contrary to law. The award must therefore be set aside."

In the case of *Halstead* v. *Seaman*, 82 N. Y. 27, the agreement for submission provided that "the arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man." The plaintiff asked permission to introduce testimony, but the arbitrators refused him such permission. The Court of Appeals set aside the award, saying (on page 30):

> "The majority of the arbitrators, having absolutely refused to hear any testimony whatever, or to allow the plaintiff to produce any witnesses, and having placed their refusal upon the ground that under the submission their powers were limited to hearing the statements of the parties; we think that it was not necessary for the plaintiff in order to preserve his rights, to actually produce, or to name his witnesses, or to state what facts he intended to prove by them. * * * * (p. 32.) The submission in this case is in the usual form; and the only clause relied upon in support of the construction put upon it by the arbitrators reads as follows: 'The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man.' * * * * Unless the arbitrators were right in their construction of the submission, the refusal to receive evidence was misconduct which vitiates their award. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award though he may think he has sufficient evidence without them."

See also the case of *Day* v. *Hammond*, 57 N. Y. 479, in which the whole subject of the right of parties to be heard before arbitrators is discussed, and maintained as one of "the principles of eternal justice;" the Court saying (on page 488):

> "The interests of justice require that a party should not be deemed to have parted with so important and essential a right as that of having his case heard, on slight evidence or on implication. The proof of waiver should be distinct and unequivocal."

> "When a matter is referred to an expert, *as such*, and he is competent to decide from personal observation, he need not take evidence unless requested to do so. * * * * But in any case, unless the parties have expressly agreed that the arbitrator need not take evidence, either party may claim, at any time before the award is made, to be heard and to adduce evidence."
>
> *Redman on Awards*, 128.

> *Redman on Awards*, 107, 108.

> *Russell on Awards*, 194.

> "Even where the subject-matter in dispute is such that the arbitrator thinks he can adjudge conclusively about it by simply taking a view, * * * * he must yet hear each party if desired so to do. His award made simply on his own inspection will be bad, at least if either wish to be heard and introduce testimony. * * * * But if the submission be to an expert as such, the rule may be different."
>
> *Morse on Arbitration and Award*, 143.

So in *Wiberly* v. *Matthews*, 91 N. Y. 648, the controversy being between the builder of a house and the owner, as to the character of work. The parties entered into an agreement to submit it to the architect who had drawn the plans and specifications for the building and supervised the work thereon, agreeing that his decision should be final. The

plaintiff attempted to assail the award on the ground that the arbitrator did not hear the parties and take their evidence; but the Court held that upon the evidence reported by the referee the party had waived any hearing before the arbitrator.

> "Gruive, the arbitrator, was the architect having charge of the construction of the building, and was familiar with all the matters submitted. The conclusion is clearly warranted by the evidence that the parties expected and intended that the arbitrator should decide the matter submitted to him upon his personal knowledge and inspection without any evidence of witnesses and any further or other hearing of the parties than he gave them. Drummond, having waived a hearing before the arbitrator and the introduction of evidence, could not after the award, complain that he was not heard." (p. 650.)

But the language of the policy in controversy in the case at bar does not provide for a reference to persons as experts, but to "competent and impartial persons."

Furthermore, Mr. Hamilton expressly refused to interpret or agree to the submission as claimed by the defendant as meaning a submission to persons acquainted with the manufacture of tobacco, unless it was upon the express understanding that the arbitrators selected should receive such evidence as either party might desire to offer before they made their award. (Exhibit 13, Rec. p. 18) So that Mr. Hamilton did not, either by silence or by agreeing to such a form of submission, waive his right to a hearing before the arbitrators, as was done in the case in 91 N. Y. It is obvious that the character of some of the facts in dispute bearing upon the amount of the loss, such as the length of time to which the property had been exposed to smoke, as well as the density of

the smoke, were beyond the scope of expert knowledge, and required witnesses.

The language, "competent and impartial persons," does not designate an expert.

Redman on Awards, 4.

> "Another matter of vital importance at the outset of an arbitration is the choice of an arbitrator. Though, as we shall hereafter see, almost any one may in ordinary cases be chosen as an arbitrator—so that if parties agree to trust the decision of their disputes to the inexperience of a child, or the vagaries of an idiot, such decision, when given, will be binding upon them—too great caution can not be observed in selecting competent and disinterested persons; for if an incompetent or interested person be chosen, it will seldom happen that he will not through some misconduct, error of judgment, or open display of bias, render his award impeachable. * * * * It does not follow because the dispute involves questions of science, business, or skill, that acknowledged masters in the science or persons of pre-eminence in the peculiar business or skill should, or indeed could, advantageously in all cases, be chosen arbitrators. The assistance of such persons is always attainable by giving their evidence before the arbitrators, in the way in which the evidence of scientific men and experts is usually given in our courts."

We claim, therefore, that upon the evidence in the record upon which the Court below instructed the jury, it is not true that the plaintiff refused the request of the defendant company to submit the difference as to amount of damage to "competent and impartial persons" *as provided in the policy.*

If our view of the nature of an arbitration as above set forth be sound, and if it be an arbitration that by the terms

of his policy Mr. Hamilton had a right to insist upon for determining the amount of his loss, then the evidence shows that an agreement to, and demand for, a submission within the terms of the policy was offered by Mr. Hamilton to the defendant company on June 3, 1886 (Exhibit 25, Rec. p. 28), which was declined by the defendant company on June 7, 1886 (Exhibit 26, Rec. p. 29). This refusal by the defendant company to arbitrate is the only refusal disclosed by the record of a demand within the terms of the policy; and the defendant therefore and not the plaintiff appears in default in the matter of the arbitration. The arbitration provided for in the policy was prevented by the action and refusal of the defendant company—not by the plaintiff—and the charge of the Court therefore in that behalf was erroneous.

II.

It will be noticed that the language of the policy provides for an arbitration, not absolutely, in any event, but only "at the request of either party;" so that, in the absence of such request by either party for arbitration, the provision for arbitration would not become operative, and would furnish no ground for objection to a suit brought before arbitration had.

Such was the language of the policy in *Wallace* v. *German American Insurance Co.*, 4 McCrary 123, in which it was claimed by the company that until after arbitration the suit could not be maintained by the assured; but Judge McCrary disallowed that defense, saying (on page 125):

> "If it was their purpose to require that in every case the damages should be ascertained by arbitration, they could have said so in plain terms."

So in *Nurney* v. *Fireman's Fund Insurance Co.*, 63 Mich. 633, the policy provided that in case of difference concerning the amount of loss or damage the matter should, at the writ-

ten request of either party, be submitted, etc. And further, it was expressly provided that no suit or action should be sustainable until after the award fixing the amount of such claim in the manner provided. Neither party having demanded arbitration, the company pleaded the absence of an award. But the Court disallowed the defense, saying (on page 637):

> "Arbitration becomes imperative only after the written request for one has been made. The request, as it stands in this policy, is optional with either party, and neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case the plaintiff was left to the mode of redress provided by law. (*Gere* v. *Council Bluffs Insurance Co.*, 67 Ia. 272.) In this case the agreement to arbitrate never became operative, and the agreement not to sue, being dependent on the agreement to arbitrate, of course must have become inoperative. * * * The arbitration provided for in the policy was a common-law one. It was revocable at the pleasure of either party. Such revocation would not invalidate the policy; neither do I think it was ever intended by the parties that a revocation should carry with it a forfeiture of the contract, or the right of the assured to maintain an action upon it in case of loss. Bringing the action was a revocation of the agreement to arbitrate. Before a forfeiture can occur there must be no question but the parties intend to provide for it in the contract under which it is attempted to enforce it. I can hardly conceive that under a contract revocable at the pleasure of either party, without condition expressed, a penalty of forfeiture can be enforced against either making the revocation. The failure of the parties in this case to arbitrate the matter in difference was the fault of the defendant, if it was desired, and it can not now be urged as a defense to the plaintiff's action."

In the case at bar the defendant company declined the offer to arbitrate made by Mr. Hamilton on June 3, 1886. The reason for the absence of arbitration is as much the fault of the defendant company as if neither party had made demand on the other therefor. The principle of the two cases above cited and others like them applies with full force to the case at bar.

Even though Mr. Hamilton may have misapprehended the significance of the words "competent and impartial persons," and misjudged his rights in insisting upon an arbitration as distinguished from an appraisement, yet, in the absence of any evidence tending to show any bad faith upon the part of Mr. Hamilton in the negotiation which failed to result in an award, it can only be said of his position at the time he brought the suit that he had made an honest effort to obtain the arbitration called for in the policy as he understood it; but failed to secure it.

We are prepared to maintain that not a single case can be found where, the policy providing for submission of the question of damages only at the request of either party, the absence of an award has been held fatal to the plaintiff's right to bring suit, provided he has made a fair effort to obtain such arbitration and award.

In *Scott* v. *Avery*, 5 H. of L. Cases, the plaintiff had made no such effort. On the contrary, he had, according to the language of the plea which was demurred to, "refused" to arbitrate. That it was the plaintiff's refusal of the arbitration called for in the contract, was admitted by the demurrer.

The House of Lords expressly excepted the case at bar from the principle of that case, Mr. Justice Coleridge saying (on page 840):

> "Covenanting parties may agree that in case of an alleged breach the damages to be recovered shall be a

> sum fixed, or a sum to be ascertained by A. B., or by arbitrators to be chosen in such or such a manner; and until this be done, *or the non-feasance be satisfactorily accounted for*, that no action shall be maintainable for the breach."

The evidence will not permit the claim that Mr. Hamilton did not make a fair effort to obtain a submission according to the terms of his policy.

III

On the 13th of May (Exhibit 22, Rec. p. 26) the defendant company addressed Mr. Hamilton as follows:

> "Please take notice that this company reserves the right to take the whole or any part of the property insured at its appraised value; and you are further notified that until such an appraisement is permitted and had, our loss, *if any*, will not be payable." (The italics are ours.)

Again, in its answer:

> "Defendant further denies that the plaintiff has done and performed all the conditions in said policy on his part to be kept and performed."

Nowhere in the correspondence is there an express avowal or admission of the liability of the company upon the policy. In view of this, we submit, that the company can not avail itself of any claim under its second defense; for, even conceding the right, in any case, to maintain such a defense under such a policy as that in the suit at bar, yet the insurance company must admit its liability under such policy, leaving as the only question between the parties, that of the amount of damage.

German American Insurance Co. v. *Etherton*, 25 Neb. 505.

Goldstone v. *Osborn*, 12 E. C. L. 726.

Mentz v. *Armenia Fire Insurance Co.*, 79 Pa. St. 478.

IV

The language of the agreement for arbitration in the policy in suit is not so framed as to oust the jurisdiction of the courts and take away the right of the plaintiff to bring his suit, even without attempting, as Mr. Hamilton did, to first reach an award.

We are not unaware of the cases that will be claimed to assert the contrary. But the question whether such a clause is a valid condition precedent is, as was said in the case of *Reed* v. *Washington Insurance Co.*, 138 Mass. 572, one of the construction of a contract; the question being "whether the agreement to refer in a particular contract under consideration is a condition precedent to a right of action upon the contract or an agreement to refer a right arising under other provisions of the contract."

Scott v. *Avery*, *Elliott* v. *Ins. Co.*, and *Braunstein* v. *Ins. Co.*, serve to illustrate the distinction we are now seeking to make between language which does, and language which does not, make the covenant for reference to arbitration a condition precedent to recovery.

In *Scott* v. *Avery*, 5 H. of L. Cases 811, the rules and regulations of the association of which the plaintiff became a member by taking his policy, were made part of the policy itself. The language of these rules and regulations is in these words:

> "The sum to be paid by this association to any suffering member, for any loss or damage, shall *in the first instance* be ascertained and settled by the committee. And the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained and settled, but not before, *which can only be claimed according to the cus-*

> *tomary mode of payment in use by the society.* And if a difference shall arise between the committee and any suffering member, relative to the settling any loss or damage, * * * in such case the member dissatisfied shall select one arbitrator and the company shall select another. And if the committee refuse for fourteen days to make such selection, the suffering member shall select two, and in either case the two so selected shall forthwith select a third, which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rules and customs of the club, to be proved on oath by the secretary. And in all cases where arbitration is resorted to, the settlement of the committee to be wholly rescinded, and the statement begun *de novo;* provided always, and it is hereby expressly declared to be a part of the contract of insurance between the members of this association, that no member who refuses to accept the amount of any loss as settled by the committee, hereinbefore specified, in full satisfaction of such loss, shall be entitled to maintain any action at law, or in suit, equity, on his policy, until the matters in dispute shall have been referred to, and decided by, arbitrators, appointed as hereinbefore specified; and *then only for such sum as the arbitrators shall award.* And the obtaining the decision of such arbitrators on the matters and claims in dispute is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit." (The italics are ours).

In *Braunstein* v. *Ins. Co.*, 1 B. & S. 782, the covenant was, that the company should

> "pay such sum by way of compensation as shall appear just and reasonable, and in proportion to the injury received; such sum to be ascertained in case of dispute or difference in manner provided by the stipulations and conditions indorsed"—*i. e.* by arbitration.

These three cases proceeded upon the ground that the special language used created a covenant to pay nothing before the adjusting of the loss—adjusted in the manner provided in the arbitration clause.

As was said by Kelley, C. B., in the case of *Elliott* v. *Royal Exchange Ins. Co.* (at page 241),

> "The question in this case is, whether the plaintiff is entitled to recover the amount of a loss by fire which he has suffered, and for which he claims to be compensated under a policy effected with the defendants, such loss not having been adjusted as pointed out in the articles subject to which the policy was made. The form of the policy is a covenant, by the defendants, that their capital, stock, etc., shall be subject to make good the plaintiff's loss, not exceeding the sum of £2,200, 'according to the exact tenor of the articles thereunto subjoined.' If the sentence had stopped at the figures £2,200, and in a subsequent part of the agreement there had been independent provisions which might be supposed to have qualified these words, it might have been a question of greater doubt whether those provisions were to be held a condition precedent, or a collateral stipulation which could not avail to oust the jurisdiction of the Court. But the covenant is itself, in its very terms, qualified and made conditional by the subsequent words referring to the articles which, following without any interval, form an integral and substantial part of the covenant. Therefore, in order to ascertain whether, where a loss has been sustained by the insured, a right of action has accrued to him, we must look at the articles 'according to the exact tenor' of which the insurance is to be paid."

And in the Braunstein case, Wightman, J., says (on page 796):

> "With reference to the fifth plea, it seems to me that the reference clause, as to the amount if disputed,

> is made a condition precedent to bringing an action, I can not read it otherwise. The clause in the policy is, that 'they should pay such sum by way of compensation as should appear just and reasonable.' If the clause had stopped there, no doubt there would have been no difficulty; but it goes on to say, 'and in proportion to the injury received; such sum to be ascertained in case of difference or dispute in manner provided by the stipulations and conditions indorsed thereon,' which is by reference to a gentleman who is to be named in a specified manner."

So that these three cases disclose really but one covenant; that is, a covenant to pay such a sum as shall be fixed by arbitration. Such is not the language of the policy in the case at bar.

The agreement for arbitration in Mr. Hamilton's policy is not incorporated in, but is distinct from the covenant "to pay, re-instate, or make good to the said assured, his heirs, executors, or administrators, such loss or damage as shall be occasioned by fire to the property above mentioned and hereby insured."

Not connected with this language of the policy creating the liability of the company to Mr. Hamilton for loss by fire not exceeding five thousand dollars, is the agreement in case differences shall arise to refer the question of the amount of loss to competent and impartial persons. The statement in the second defense (Rec. p. 2), that the conditions there set forth providing for arbitration "constituted the basis of such insurance," is a mis-statement by the pleader, perhaps inadvertently. The language pleaded in the second defense, providing for a submission of the question of the amount of loss to competent and impartial persons, is part of clause 10, and is one of the "conditions relating to the methods of adjustment of loss and the payment thereof" (Rec. p. 30). Such conditions

are in their nature conditions subsequent—independent covenants—not essential terms of the original covenant. The "conditions upon which this policy is issued" precede the tenth clause, and do not include among them the language pleaded in the second defense. In *Scott* v. *Avery*, the agreement to arbitrate was one of the conditions—as in the case at bar it is not—upon which the insurance was based or issued, and which constituted an essential term of the principal covenant of indemnity.

V.

The provision of clause 11 (Rec. p. 31) is, that no suit or action against the company under the policy should be sustainable until after an award, "nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim; any statute of limitation to the contrary notwithstanding."

If, then, the agreement to refer to arbitrators is construed as a condition precedent to recovery, it follows (there being no language to the contrary in the policy) that the insurance company might defer the award until after the twelve months' limitation had elapsed, and thus entirely defeat plaintiff's claim under the policy by limitation, either by prolonging negotiation and discussion as to what the arbitration clause meant, as defendant did for two months with Mr. Hamilton, or by failure of the arbitrators (even if ultimately selected) for any reason to conclude their labors within the twelve months.

It should be remembered in this connection that the insistence by Mr. Hamilton upon a stipulation in the submis-

sion that the arbitrators should make their award within a reasonable time, was opposed by the company with a persistence of objection not without its significance.

We submit that the provision in the policy for arbitration is repugnant and unreasonable when read in connection with the limitation of twelve months, and should be disregarded as invalid.

VI.

If the arbitration provided for in the policy is a common-law arbitration it is revocable by either party before award made. This of itself would prevent the operation of the defense in this case upon the clause pleaded.

In the case of *Commercial Union Ins. Co.* v. *Hocking*, 115 Pa. St. 407, the arbitrators were appointed, but being unable to agree filed no award. Suit was brought by the assured. The defendant asked the Court to charge that, as there had been no award under the arbitration clause, and as it was expressly provided in the policy that no suit should be brought until award made, the verdict must be for the defendant. The trial judge refused to so charge, and while the judgment was reversed upon another ground, the Court held that the error assigned for this refusal to charge could not be sustained, saying (on page 414):

> "Where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party; and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute."

So in the case of *Schollenberger* v. *Phœnix Ins. Co.*, of Brooklyn, United States District Court, Eastern District of Pennsylvania, decided by Cadwallader, J., McKennan, J.,

concurring, 6 Reporter 43. The provision for arbitration and that no suit should be brought until after the award were as in the case at bar. The Court say:

> "We have no hesitation in saying that the condition to refer, and that no suit shall be brought until after award made, do not suspend the plaintiff's right of action. This has been decided in the case of *Mentz* v. *Armenia Ins. Co.*, 79 Pa. St. 478. The plaintiff, on the evidence, is therefore entitled to judgment, the covenant being a collateral one, and not a condition precedent."

VII.

The question upon the issues joined and the evidence submitted was one for the jury. The direction by the Court of the verdict was for that reason error.

It may be that where, on such a policy, the insured has brought his action without attempting to secure arbitration as he understood his contract to require it, or where he has refused arbitration of any kind on any terms or character of submission—wholly declining to negotiate or co-operate to effect a reference of the amount of loss in any form—the question may be solely one of interpretation of the contract for the Court.

But such is not the case here. Hamilton made repeated attempts to come to terms with the company; and whether or not his conduct in this regard amounted under the circumstances, and in connection with the conduct of the Company, to an honest effort to bring about "a submission," was a question for the jury.

One of the objections of the company was, as we have before noticed (pp. 47, 48), to any provision in the submission limiting the time within which the award should be made.

In view of this situation, the delay and procrastination of

the defendant, even without a refusal on its part, constitute such evidence of bad faith as should have been submitted to the jury; for a policy of delay by the company, pending great loss and expense to the assured, would operate to relieve the plaintiff from the obligations of the arbitration clause.

> "There was evidence tending to show, and from which a jury might have inferred, that the defendant was not acting in good faith to procure a speedy appraisal, and was interposing this clause in the policy for the purpose of forcing a compromise from the plaintiff. Upon all the evidence, it was a question of fact for the jury to determine whether there was any breach of this clause in the policy on the part of the plaintiff; and the case should thus have been submitted to them."
>
> *Uhrig* v. *Williamsburgh City Fire Ins. Co*, 101 N. Y. 362.

VIII.

The issue made was on the allegation of the second defense of the answer, that "defendant requested of plaintiff in writing that said difference be submitted to competent and impartial persons, as provided in said policy." (Rec. p. 3.)

If the distinction we have pointed out, between "appraisal" and "arbitration," be sound, and if this language of the policy referring the difference as to loss to "competent and impartial persons," entitled Mr. Hamilton to a hearing before arbitrators, as he assumed it did, then it would follow that the demands for "submission to appraisers" in Exhibit 16 (Rec. p. 21) and Exhibit 20 (Rec. p. 25) did not tend to establish the demand for arbitration required by the policy, and their admission as evidence of such demand was improper, and is one of the errors complained of, as well as the charge of the Court based upon such evidence, finding the issue joined against the plaintiff and directing a verdict for defendant.

Exhibit 16, starting with the explicit explanation that what the company thereby demanded was "in no sense a court for the hearing of evidence" (Rec. p. 21), inclosed a form of submission to "appraisers" who should make an "appraisement," the said appraisers to make an "estimate," article by article, and in the declaration of "appraisers" they were to swear "to make an appraisement and estimate" according to the best of their "knowledge, skill, and judgment."

And so, in Exhibit 20 (Rec. p. 25), "we present herewith a form of agreement of submission to 'appraisers,' and upon your assent thereto will be prepared to name our 'appraiser,'" and by this form of submission to "appraisers" the "appraisers" were sworn to "return to the said insurance company (*i. e.*, defendant company) a true and perfect and a just and conscientious 'appraisement' and estimate of damage," "to the best of our knowledge, skill, and judgment.

Now, all of this means, unmistakably, appraisement. It provides for no notice of hearing; no right to be heard with witnesses; no time is limited within which the appraisers shall "return to the company" the estimate based on their "knowledge, skill, and judgment."

It is not an offer of arbitration. It excludes the notion of arbitration, both by what it omits to provide for and by its express language.

We submit, it was not an offer within the terms of the policy, if the policy calls for arbitration.

For these reasons we say that:

I. The second defense is founded on a provision in the policy, which is:

a, Repugnant and invalid;

b, Merely a collateral covenant—not a condition precedent.

II. Even as a condition precedent:

a, Hamilton did not refuse—on the contrary, he demanded—arbitration in the manner provided by the contract;

b, The company refused submission to arbitration, which was what the policy called for;

c, The question whether plaintiff refused or defendant refused, was for the jury;

d, The conduct of both parties, as bearing on good faith, or honest effort to effect arbitration, should have been left to jury;

and the direction of a verdict for defendant by the Court below was error, for which we ask a reversal of its judgment.

JOSEPH WILBY.

KITTREDGE & WILBY,
For Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 356.

ROBERT HAMILTON, *Plaintiff in Error*,

vs.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, OF GREAT BRITAIN,

Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

Supreme Court of the United States.

ROBERT HAMILTON,
Plaintiff in Error,
vs.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY OF GREAT BRITAIN,
Defendant in Error.

Error to the Circuit Court of the United States, for the Southern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

This is an action at law upon a policy of insurance for $5,000, issued by the defendant company on leaf and manufactured tobacco and materials for making the same, situated in a certain warehouse in Covington, Kentucky.

The plaintiff claims that the property so insured was damaged by fire and smoke to the extent of $10,000, on the 16th day of April, 1886, and that the defendant is liable under this policy for one-half of the loss.

The answer admits a loss within the terms of the policy, but disputes the amount claimed, and specially pleads as a

defense to the action that when differences arose as to the amount of the loss and damage sustained by plaintiff, which could not be determined by agreement, the company requested of plaintiff in writing that said differences be submitted to competent and impartial persons as provided in the policy; but plaintiff refused so to do, and did not permit an appraisal to be made in accordance with the terms of the policy, and no award has been obtained fixing the amount of plaintiff's claim, without which any loss sustained by plaintiff is not payable, and this action is not sustainable by the express terms and conditions of the policy.

In reply, plaintiff denies that the company requested that the amount of plaintiff's loss be submitted to competent and impartial persons as provided in the policy; and denies that plaintiff refused so to do, and that plaintiff did not permit an appraisement to be made in accordance with the provisions of the policy; but avers, on the contrary, that plaintiff himself demanded such an appraisement, and defendant refused so to submit the same.

The evidence relevant to these issues consisted of the policy and certain letters which passed between the parties, copies of which are attached as exhibits to the bill of exceptions.

Upon this evidence, the Court charged the jury that the defendant was entitled to a verdict on the issues joined as above stated, and that plaintiff could not recover in this action.

The bill of exceptions and the assignments of error present the following questions for consideration by this Court:

1st. Did the Circuit Court err in holding that the terms and conditions of the policy relative to an appraisement are

valid, and compliance therewith by plaintiff was a condition precedent to his recovery in this action?

2d. Did that Court err in its construction of the correspondence between the parties, in charging the jury that it appeared therefrom that defendant requested the plaintiff in writing that the amount of plaintiff's loss or damage under his policy be submitted to competent and impartial persons as provided in said policy, and that plaintiff refused so to do.

I.

The provisions of the policy relating to an appraisal are as follows (Record, p. 72):

10. "When property is damaged, the assured shall forthwith cause it be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity and quality of each article. The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted at equal expense of the parties to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company; and until such proofs, declarations, and certificates are produced, and examinations and appraisal permitted, the loss shall not be payable.

11. "It is furthermore expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable

in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The validity of such conditions in policies of insurance was sustained in the case of *Scott* v. *Avery*, 5 H. L. C. 811, decided in 1856.

The conditions of the policy in that case were substantially the same as in this; and they had been sustained in the Court of Exchequer Chamber, so far as they related to ascertainment of the loss (20 Eng. L. & Eq. Rep. 327).

This decision was affirmed by the House of Lords, after submission to the judges, a majority of whom so advised, and in accordance with elaborate opinions from the Lord Chancellor (Cranworth) and the Lord Chief-Justice (Campbell).

It was agreed by all the judges that an agreement of parties to refer all matters of dispute to arbitration would not bar an action; but a distinction was recognized by those favoring affirmance, which is stated as follows in the syllabus:

"It is a principle of law that parties can not by contract oust the courts of their jurisdiction; but any person may covenant that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the covenant."

This case has been followed, and similar conditions held to be valid, in

Elliott v. *The Royal Exchange Insurance Co.*, 2 Law Rep. (Exch.) 237.
Tredman v. *Holman*, 1 Hurlston & Coltman, 80.
Braunstein v. *Accidental Death Company*, 1 Best & Smith, 782.

No case involving such a condition in a policy of insurance appears to have been presented until now to this Court; but the same principle has been applied in an action upon a

charter party for conveyance of troops, which provided for payment upon certificate of the commanding officer; wherein it was held that "when the parties in their contract fix a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He can not compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

United States v. *Robison*, 9 Pet. 327.

Similar conditions have, however, been enforced by the Circuit Courts in actions on policies of Insurance.

Yeomans v. *Insurance Co.*, 5 Ins. Law Journal 858 (in the District of New Jersey).

Gauch v. *The London and Lan. Insurance Co.*, 10 Fed. Rep. 355 (in the District of Louisiana.)

And they have also been sustained by the State Courts.

In Connecticut:

Hale v. *Norwalk Fire Insurance Co.*, 57 Conn. 114.

In California:

Dry Dock Co. v. *Insurance Co.*, 66 Cal. 253.
Adams v. *Insurance Co.*, 70 Cal. 198.
Carroll v. *Insurance Co.*, 72 Cal. 301.

In Texas:

Insurance Co. v. *Carney*, 71 Texas 5.

In Minnesota:

Gasser v. *Sun Fire Office*, 19 Ins. L. J. 243 (decided by Supreme Court in January, 1890)

In New Jersey:

Liverpool and London and Globe Insurance Co. v. *Wolf*, 50 N. J. Law Rep. 453.

The conditions of the policy involved in this case were identical with those at bar, and the Court says, in regard to them:

"It is clear, beyond all possibility of controversy, that the agreement between the assured and the company was, that if they could not agree on the amount of the loss, the sum recoverable should, if an arbitration was requested, be the amount found by the award. Such an agreement is both legal and reasonable, and it is not perceived that any authority exists which holds a contrary doctrine. There are, it is true, decisions to the effect that a clause merely declaring that if the parties shall disagree as to the amount of the loss, such differences shall be arbitrated, does not create a condition precedent; but this is for the reason that it is not made such by the terms of the contract. But in the present policy the parties have stipulated that the award upon the submission shall precede the right to sue.

"The legal rule in this form is not open to discussion, as will clearly appear by a reference to the cases collected in any of the text-books."

In support of this assertion of the Court, see:

May on Insurance, Sec. 493.
2 *Wood on Insurance*, Sec. 457.
Morse on Arbitration, 93.

Most of the cases above cited have been decided since this case was tried in the Circuit Court, and we are not aware of a single authority to the contrary in either country since the decision in *Scott* v. *Avery*.

In some cases the Courts have found that the policies under consideration did not make the submission to appraisers or arbitrators a condition precedent to recovery on the policy;

but they recognize the necessity of such submission whenever, as in this case, it is made a condition precedent by the express terms of the policy.

Reed v. *Washington Insurance Co.*, 138 Mass. 572.
Liverpool and London and Globe Insurance Co. v. *Creighton*, 51 Ga. 95.
Stephenson v. *Insurance Co.*, 54 Me. 70.

In *Metz* v. *Insurance Co.*, 79 Pa. St. 478, it was held, that the company could not demand an appraisement while denying any liability under the policy; but this decision has no applicatiou to this case, otherwise than as a recognition of the rights of the company to require an appraisement where the amount of loss or damage is the sole matter of contention.

We submit that, upon authority as well as reason, the right of the defendant in this case to require submission of the differences that arose between itself and the assured as to the amount of loss or damage to competent and impartial persons chosen as provided in the policy is unquestionable; and if plaintiff refused to permit such an appraisal to be made he can not recover upon this policy.

If, then, the Court was right in its construction of the correspondence between the parties on this subject, the jury was properly instructed to return a verdict for the defendant.

II.

Was the Circuit Court right in its construction of the correspondence? or did it err in holding that the defendant company therein requested an appraisal in accordance with the terms of the policy, which was refused by the plaintiff?

The correspondence contains four distinct demands for an appraisal made by the defendant company:

1. The formal proofs of loss were furnished by the assured on April 26, and in the letter of next day, acknowledging their receipt, the general agent of the company demanded an appraisal of the stock as to value and damage (Exhibit 8, Rec. p. 50).

2. In his letter of April 24 (Exhibit 5, Rec. p. 46) the assured had suggested that the several companies having policies affected by this fire might be willing to act in concert, "which would save much trouble and expense in furnishing proofs;" and on April 28 a joint demand was made by the companies for an appraisal as provided in the several policies (Exhibit 12, Rec. p. 55). This demand as originally made applied only to policies on stock in the adjoining buildings Nos. 413 and 415 Madison street, but it was subsequently extended so as to include this policy (Exhibit 16, Rec. p. 61), and was so accepted by the assured (Exhibit 17, Rec. p. 64).

3. On May 8, the effort to secure a joint appraisal having failed, the defendant renewed its separate demand (Exhibit 20, Rec. p. 65).

4. Again, on May 13 this demand was repeated, and an appraiser was named by the company (Exhibit 22, Rec. p. 67).

The correspondence further shows that in response to these demands of the company the assured refused to submit the differences that had arisen as to the amount of his loss and damage to appraisers, except on conditions to which the company refused assent. And it also shows that the demand for an appraisal made by him, and referred to in his reply, was coupled with a like condition.

We submit that the assured had no right to insist on such conditions, and was therefore responsible for the failure to submit the amount of his loss and damage to appraisers in accordance with the conditions of the policy.

These conditions and their object are disclosed in the course of the correspondence.

On April 24, before the formal proofs of loss were submitted, the assured proposed to the company to send the entire stock covered by this policy to Cincinnati, to be sold at auction as "the most satisfactory way to all parties of determining the present value, and thereby ascertaining the amount of the loss" (Exhibit 4, Rec. p. 45). And on the same day he made a similar proposal in regard to the property in the adjoining buildings covered by another policy of this same company (Exhibit 5, Rec. p. 46).

On the same day, the general agent of the company, acknowledging the receipt of the letter, informed the assured that they could not consent to his disposal of the property by sale, and advised him that it might be necessary to have the stock appraised after receipt of the proofs of loss (Exhibit 6, Rec. p. 47).

On April 26 the formal proof of loss, with invoice attached, was inclosed by the assured in a letter which again advised the company that he proposed "to send the entire stock to be sold at public auction in a few days" (Exhibit 7, Rec. p. 47).

On the next day, April 27, the general agent of the company acknowledged receipt of those proofs, and then adds:

"Noting your purpose soon to sell the stock, permit us to say that we protest against such a disposition of it at this stage, and against this ex-parte way of determining the loss sustained. Conditions of our policy provide the manner and mode of determining the loss or damage, and we hereby formally demand an appraisal of the stock as to value and damage under each policy, each party to name a competent and disinterested party." (Exhibit 8, Rec. p. 50.)

Replying to this letter on the same day, the attorney of Mr. Hamilton says that he finds no provision in the policy restricting the assured from removing or selling the damaged property, and informs the company that the property covered by this policy was already being removed to a warehouse in Cincinnati, and he expected to bring it to public sale within two weeks, during which time it would be subject to whatever examination the company wished to make (Exhibit 9, Rec. p. 50).

To this the company replied on the next day, April 28, calling attention to the provision of the policy giving the company the right to take the property or any part thereof "at its appraised value," and again objecting to any disposition of the property prior to the appraisement, or to any ex-parte method of fixing the amount of the loss; also asking for a direct answer to the request for an appraisemet (Exhibit 10, Rec. p. 52).

On that same day the companies insuring property in the adjoining building made their joint demand for an appraisal as provided in their several policies (Exhibit 12, Rec. 55).

On the next day, April 29, the assured, by his attorney, replied to both the separate and joint demands in substantially the same terms, still insisting that a sale at public auction presented the fairest mode of ascertaining the value of the property as it stood, but acceding to the appraisement as requested, "upon the express understanding that the arbitrators selected should have a full opportunity to examine the stock of tobacco, and that it should then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party might desire to offer, might be presented to the arbitrators before they made their award." (Exhibit 13, Rec. p. 56.)

This proviso was rejected by the several companies, they

insisting upon an arbitration in accordance with the terms of their several contracts "without imparting into it any conditions as to the sale of the property." (Exhibit 14, Rec. p. 57.)

In reply, the attorney of Mr. Hamilton denied that an arbitration in the manner indicated imported any condition which the assured was not entitled to insist upon, or which was incompatible with the provisions of the several policies, or the rights of the insurance companies thereunder, but requests the companies to submit a form of agreement for arbitration, or in some other mode indicate the specific terms of the arbitration demanded by them. He explains that his letter of April 29 (Exhibit 13) did not call upon the companies to consent to a sale of the property, but simply required that the arbitration should be commenced, when the arbitrators might have an opportunity of examining the property, and that the award should not be made until after the sale had taken place and the assured had had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award was made. (Exhibit 15, Rec. p. 59.)

On May 3, in compliance with the above request, a form of agreement for submission to appraisers was inclosed, with the statement that it was in practical accordance with the conditions of all the policies; and all the companies, including the insurers of stock in No. 417, were willing to sign and abide by the award reached thereunder.

This form of agreement merely provided that the persons named therein should appraise and estimate the loss by fire upon the specific property, said appraisers to estimate the cash value of the property immediately before the fire, and in the same manner, article by article, of the loss or damage thereto.

In the same letter the companies again reject the proposition that the arbitrators, after examining the stock, should postpone their award until after the stock had been sold, when

the result of the sale with other evidence should be submitted to them; insisting that the arbitration provided for in the policies was in no sense a court for the hearing of evidence; although the appraisers might in their discretion seek any evidence they might deem necessary for their own full information, and the forming of their own judgments as to the value and damage of the goods; and also insisting that after the award had been reached the companies had the right to take the stock in whole or in part at their appraised value. (Exhibit 16, Rec. p. 60.)

On the next day, May 4, Mr. Hamilton, by his attorney, declined to consent to such an appraisement, or to be bound by an award of appraisers who should estimate the loss by their own judgment without hearing the testimony of witnesses who might be called by either party, and inclosed a demand for arbitration in his own behalf, "it being stipulated in the agreement that the parties shall be duly notified of the time of hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss." (Exhibit 17, Rec. p. 63.)

This demand also applied to the property insured in No. 417.

The companies replied, on the following day, that if Mr. Hamilton declined to consent to a form of submission that did not provide for the introduction of "all competent and legal testimony that may be offered by either party" (under which provision Mr. Hamilton had repeatedly declared he would seek to present evidence based on a sale of the property), they must accept it it as a refusal to comply with the terms of the policies (Exhibit 18, Rec. p. 64).

In a subsequent letter, May 7, exception was taken to a

statement of Mr. Hamilton's attorney, in his letter of May 4 (Exhibit 17), in relation to the position taken by the companies, which is again stated to be that the appraisers might, in their discretion, seek any evidence they deemed necessary for their own full information, and the companies again demand a submission free from any conditions imposed by either party (Exhibit 19, Rec. p. 65), which closed the joint correspondence.

On the day following, May 8, the Liverpool and London and Globe Insurance Company renewed its separate demand, and submitted a form of agreement (Exhibit 20, Rec. p. 65), which Mr. Hamilton declined to entertain (Exhibit 21, Rec. p. 67).

Again, on May 13, the company repeated its demand, and named an appraiser in its behalf, at the same time notifying the assured that until such an appraisal was had, the loss, if any, was not payable (Exhibit 22, Rec. p. 67).

On May 15, Mr. Hamilton's attorney replied, adhering to the position taken by him in the joint correspondence (Exhibit 23, Rec. p. 68); but on June 3, recurring to the subject, informed the company that Mr. Hamilton had disposed of the property by sale at public auction; and if the company really desired to submit to arbitration the amount of loss, he was *now* quite ready to submit that question to competent and impartial arbitrators, but still demanded that in the agreement for submission it should be provided that the arbitrators should hear all competent and legal testimony that might be offered by either party (Exhibit 25, Rec. p. 70).

To this the company replied that as the goods had been sold and scattered, an appraisement within the terms of the policies was no longer possible, and, by the course pursued, Mr. Hamilton had in its judgment waived any rights he may have had under the policies (Exhibit 26, Rec. p. 71).

The determination of the assured to establish the amount of his loss by a sale of the property at public auction, and not to submit to an appraisement except on terms that would admit of such a course, is clearly disclosed in this correspondence.

That he had no right to exact the consent of the companies to such a sale, is too clear to admit of argument.

In *Hoffman* v. *Insurance Co.*, 1 La. Annual 217, where the assured had sold the damaged goods and claimed to recover the loss thus established, the Supreme Court of Louisiana says, that although insurance companies sometimes assent to a sale of the damaged goods at auction to ascertain their value, "they are under no obligation to do so without a clause to that effect."

Moreover, by the terms of the policy in this case, the company had the right to take the property, or any part of it, at the appraised value, and could not be required to waive this right. Nor did the offer of the assured to permit the companies to make their own appraisement of the value of the stock, and take it at their appraisal, obviate this objection (Exhibit 17, Rec. p. 63) The right to take the property at its appraised value was merely designed to enable the company to protect itself against an excessive award, giving the right to elect whether to pay the amount of the award or to take the entire property at the appraised value.

It is true that the assured did not adhere to the condition first imposed (Exhibit 13, Rec. p. 56), that the company should assent in terms to such a sale. The first modification (Exhibit 15, Rec. p. 59) was to simply require an agreement of the companies that the award should not be made until after the sale had taken place, and the assured had an opportunity to submit the result of it to the arbitrators before the award was

made; but this involved an implied consent to the sale, and was equally inadmissible.

This was the final response of the assured to the demand of the companies; but on the next day his attorney, evidently recognizing his position as untenable, himself demanded an arbitration of the amount of the loss sustained, "it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods in considering and awarding the amount of the loss." (Exhibit 17, Rec. p. 64.)

But this condition, while it contains no reference to the sale of property, was evidently designed to accomplish the same purpose, and this purpose was not disclaimed when asserted by the companies as a reason for refusing assent to the condition (Exhibit 18, Rec. p. 64). And even if it would not have committed the companies to the proposed sale, and could not be used by the assured as evidence of their assent thereto, it is manifest that the assured expected to secure some advantage thereby; and the companies were clearly justified in refusing consent to an agreement not required by the terms of their policies which might be used for such a purpose on a trial before a jury.

It is, however, claimed by the plaintiff in error that this condition, as finally insisted upon, merely secured a right to which he was entitled, and upon which he had a right to insist under the terms of his policy—that the arbitrators or appraisers appointed under it should hear all competent legal testimony which he might offer.

If this was his right, and his only purpose was to secure

such a right, the agreement was wholly unnecessary. But we submit, that he had no such right, and the rule of law applicable to such an appraisement was correctly stated by the agents of the companies (Exhibit 16, Rec. p. 60, and Exhibit 19, Rec. p. 65), that while the appraisers might, in their discretion, seek any evidence they deemed necessary for their own full information, they were not, strictly speaking, a court, and were not governed by the strict rules of evidence applicable to judicial proceedings.

While it is generally the duty of appraisers or abitrators to hear competent and legal testimony offered by either party, they are still vested with considerable discretion as to the mode of procedure and reception of evidence.

Morse on Arbitration, 115, 135, 142.
Maynard v. *Frederick*, 7 Cush. 246.
Hagger v. *Baker*, 14 Mees & Wels 9.
Nickolls v. *Warren*, 6 Q. B. 618.

Especially is this so if the appraisers or arbitrators are selected on account of their knowledge or skill.

Morse on Arbitration, 143.
Russell on Awards, 194.

Thus, in *Johnston* v. *Cheape*, 5 Dow 247, an arbitrator refused to hear any evidence, considering himself thoroughly competent to judge of the matter himself; and it was held by Lord Eldon that as he had been selected as arbitrator on account of his own skill in such matters his refusal to hear testimony was not improper.

In *Eads* v. *Williams*, 24 Law Journal (Eg.) 531, when the amount of rent to be paid for a coal mine was referred to surveyors, it was held that it was not incumbent upon them

to examine witnesses "provided *bona fide* they meant to say, we know sufficient of the subject to decide properly without examining witnesses."

And in *Hall* v. *Norwalk Fire Ins. Co.*, 57 Conn. 114, involving an appraisement of damaged goods under policies of insurance, it was held that, when persons are selected as arbitrators by reason of special knowledge or skill possessed by them with reference to the subject-matter, they may even be justified in refusing altogether to hear evidence.

In *Van Courtlandt* v. *Underhill*, 17 Johns 405, where improvements had been appraised in accordance with the terms of a lease, and the award was set aside because the arbitrators had refused to hear testimony offered by one of the parties, the lease did not provide for a submission to experts; but there was nevertheless considerable conflict of opinion among members of the court whether the rejection in this case was not within the discretion of the arbitrators; and the opinion of Senator VanVechten, who inferred that they had been selected by the parties on account of their knowledge and skill in such matters (p. 432, 433), is an able exposition of the law applicable to such appraisements.

The character of the submission in any case can not be determined by the name applied to the persons selected, for the words "appraisement" and "arbitration" are often used interchangeably, but, as an indication of the nature of the procedure, the former, which is the word used in these policies, seems to indicate that the persons selected should have sufficient knowledge and skill to act upon their own judgment. This, however, is determined in this case by the terms of the policy, which provide that the appraisers shall be competent persons, which was properly construed by the attorneys of the assured to mean a man acquainted with the manufacture of

tobacco (Exhibit 11, Rec. p. 53), and the subject-matter of the reference likewise shows such to be the case.

It would be manifestly absurd to require appraisers, who were themselves competent judges of the condition and value of the damaged property, to act on the testimony of other experts, which would undoubtedly be "competent and legal testimony" in a trial before a jury—and such clearly is not the law.

The refusal of such appraisers to hear witnesses, or to consider evidence which should influence their judgment, might of course be evidence of reckless judgment or bad faith, and thus invalidate their award. It is unnecessary now to determine whether a refusal of appraisers selected in accordance with the policies in this case to consider the result of a sale of the property at public auction would invalidate their award. While the testimony would be competent, its value as evidence was greatly exaggergted by the assured. If the goods were open to inspection and sold upon their merits, it might be a fair test; but when sold as in this case, as damaged goods which had been exposed to fire (Exhibit 24, Rec. p. 68), it would be entitled to little weight. We do not think it could materially affect the judgment of competent appraisers—men acquainted with the manufacture of tobacco—who had ample opportunity themselves to examine the goods and ascertain their condition. But, however that might be, we insist that the law authorizes appraisers to exercise discretion in such matters, subject to review by the Courts if such discretion is abused, and that the assured in this case had no right to refuse submission to appraisers as required by the policy, unless the companies would enter into an agreement limiting their discretion, and requiring them to receive any testimony that would be competent in a trial by jury.

In so holding, we submit that the Circuit Court committed no error, and the judgment for defendant is in accordance with the law applicable to the facts disclosed by the record.

CHANNING RICHARDS,
For the Defendant in Error.

RUFUS KING,
S. J. THOMPSON,
THOMAS B. PAXTON,
CHARLES H. STEPHENS,
Of Counsel.

Robert Clarke & Co., Printers.] [April, 1890

Ohio Supreme Court
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1889.

Robert Hamilton,

Plaintiff in Error,

No. 326.] *vs.*

The Liverpool, London and Globe Insurance Company, of Great Britain,

Defendant in Error.

Error to the Circuit Court for the Southern District of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

The Liverpool, London and Globe Insurance Company, of Great Britain,

Defendants in Error,

No. 326.] *ads.*

Robert Hamilton,

Plaintiff in Error.

This was a suit brought in the Circuit Court of the United States for the Sourthern District of Ohio, Western Division.

The policy was an ordinary fire insurance policy to Hamilton for $5,000.00.

"On his tobacco in hogshead, his own, held in trust, on commission, or sold and not delivered, where he may be legally liable, contained in the three-story brick building, known as the Kenton Tobacco Warehouse, situate Nos. 212, 214, 216, 218 & 220 Greenup Street, Covington, Ky."

The policy was issued, "subject to the conditions and stipulations which constitute the basis of insurance," and by the final agreement, that, "By accepting this policy the assured agrees to become bound by its terms and conditions."

The damage done to the tobacco was principally by smoke from a fire in one of the buildings and the con-

troversy was as to the amount of damage. The policy provided for certain proof to be presented, and in case of disagreement as to the amount of loss, for an appraisement upon demand in writing.

The parties not being able to agree upon the sound value and the amount of loss or damage, the defendants in error demanded in writing that the same be fixed by appraisement, in accordance with the conditions and stipulations of the policy.

The policy had the following stipulations:

"The amount of sound value and of the loss or damage shall be determined by agreement between the company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award, in writing, of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company, and until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole or any part thereof at its appraised value."

The policy had this further provision:

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

These provisions were set up in the answer as a defense, and a refusal to submit to arbitration averred.

It will be seen by the correspondence between the plaintiff in error and the companies that he was informed at the outset that he should not remove or dispose of the stock from which loss was claimed, unless by agreement with the companies, but that he, in fact, was determined to remove it, and have it sold at auction, from the beginning. The correspondence clearly discloses an effort to get rid of an appraisement and arbitration, or to put such conditions to his consent to the same as would make it impossible for the companies to agree to it. It in no sense discloses an inclination to consent to the appraisement contemplated by the policies, and which the companies from the beginning insisted should be made. The loss occurred on the 16th of April, 1886, and on the 23d of April, the companies wrote Mr. Hamilton as follows:

"You will be expected to conform strictly to the conditions of said policy respecting the method of presenting the claims for loss, and no conditions of the policy or right of the Liverpool and London and Globe Insurance Company thereunder are, in any manner, waived or abandoned by that company. You will, of course, understand the necessity of not removing or disposing of any part of said stock upon which loss is proposed to be claimed pending the settlement of the claim, unless by agreement with the insurance companies." (See *Exhibit* 3, *Record*, *p.* 9.)

The subsequent correspondence clearly shows that the plaintiff in error had determined to send the entire stock to be sold at auction, claiming that to be the most satisfactory way of ascertaining the amount of the loss, and stated further, that if such course was not assented to by the company, that he should be obliged to remove the prop-

erty from his own warehouse and put it in storage, and that in his judgment the expense attending it and the disposition of it would considerably increase the amount of the loss. See Exhibit No. 4, pp. 9 and 10 of the Record. And although the plaintiff in error thus admits that the expense of such removal and storage would considerably increase the amount of the loss, he seems ultimately to have taken that course against the continued protests of the companies, and in the face of their protest against such removal and sale, and their demand for an appraisement of the stock as to value and damage as provided for in the policies. Mr. Hamiton claimed that he had a right to send the goods off to auction, and to get them out of his factory, that he might proceed with his business. This he was not entitled to.

Niblo v. *North American F. Ins. Co.*, 1 Sandford Supreme Court Rep. 556.

He could not throw the loss to him in business upon these defendants. That was the result of his claim. The loss of the rent of his store, the delay and loss in his business, the underwriters had not assumed, and he could not force it upon them, as Mr. Kittredge in his letters endeavored to do. It is settled that whatever delay or loss to him in his business, which was the ordinary delay of such a disaster, he must bear, and the parties have a right to a reasonable time to adjust the loss in accordance with the terms of the policy and without unnecessary expense. The preliminary proof was sworn to on the 26th of April. It was not served upon the defendants before the 27th. As soon as the claim could be examined on the 28th, the defendants made their written demand for an arbitration. The

next day Mr. Kittredge pressed the removal of the goods to an auction shop for sale as damaged goods.

In the correspondence between the parties in reference to the arbitration, Mr. Kittredge, representing plaintiff in error, in his letter of the 29th of April, 1886, has the following:

"But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." (*See Printed Record*, 18).

These conditions were objected to as incompatible with the provisions of the policies. (*See Printed Record*, 19).

The plaintiffs in error, by their counsel, in their letter of the 30th of April say:

"I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value, thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award,' does not in anywise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place, and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made. An early answer is solicited:" (*See Printed Record*, 20).

To this the defendant in error replies on the 3d of May:

"We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information and the forming of their own judgments as to the value and damage of the goods, but we insist that under the condition of the several companies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value. The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto." (*See Printed Record*, 21.)

Mr. Kittredge, on the 4th of May finally makes the following demand:

"Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th of April, and will select an arbitrator to represent him, in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods in considering and awarding the amount of the loss." (*See Printed Record*, 23.)

The defendant in error, on the 5th day of May, makes the following reply:

"E. W. KITTREDGE, ESQ., *Cincinnati, O.*—

"*Dear Sir:*—Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party' (under which provision, as you have repeatedly declared, Mr. Ham-

ilton would seek to present evidence based on a sale of the property), we must accept your communication as a refusal to comply with our request, and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter." (*See Printed Record*, 24.)

The parties not being able to agree, the defendants in error put their demand in the following language:

"MR. ROBERT HAMILTON, *Covington, Ky.*—

"*Dear Sir*:—Objecting to the amount of your claim for loss and damage under policies 2,823,517, and 2,907,-224, we demand, according to condition 10 of the policies, that the differences which have arisen between us as to sound value and loss or damage to the goods covered by said policies shall be submitted, at equal expense between us, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall elect an umpire to act with them in case of their disagreement.

We name as our appraiser William Spear, of St. Louis, and upon the naming of your appraiser we will meet you to sign an agreement, embodying the provisions of our policies without any conditions." (*See Printed Record*, 26.)

To this Mr. Kittredge replies on the 15th of May, and gives notice, dated the 17th of May, of the sale of the property, as follows:

"Mr. Hamilton adheres to the position taken by him in the joint correspondence between the insurers and Mr. Hamilton and myself in his behalf.

Mr. Hamilton has acted upon the conclusion reached in that correspondence, and I do not understand that your company proposes to change its own attitude as taken in that correspondence." (*See Printed Record*, 27.)

The above presents the clauses of the policy in question and the position of the parties in relation thereto. The question is, whether the circuit court erred in directing a verdict for the defendant. The above statement presents certain facts:

I. The appraisement provided for is to be of the value of the property and of the loss only.

II. It was to be by competent and impartial persons.

The policy so provides, and both parties so understand it. (*Printed Record*, 31 and 34).

It is quite evident that the purpose of this provision was to prevent a long and expensive litigation over questions of value, before court and jury, that was likely, from the ordinary prejudices of that tribunal, to be disastrous to the underwriter.

Two or three competent and disinterested appraisers with such information as they could obtain, was an inexpensive and accurate mode of ascertaining the value of the property and its loss. The defendant says:

"We must again decline to entertain your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies, is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information and the forming of their own judgments as to the value and damage of the goods, but we insist that under the condition of the several companies, there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value.

The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver or adding new and inconsistent conditions thereto." (*See Printed Record*, 21).

Mr. Kittredge's conditions would only increase the difficulty, for how could these appraisers or arbitrators decide as to competent evidence. It would embarrass them by a regular trial; for if evidence is to be offered, and that of sale, the parties would have the right to be heard, and thus the difficulty sought to be avoided would be increased.

I here desire to call the attention of the court to a decision of the *Glendale Manufacturing Company* v. *The Protection insurance Co.*, 21 Conn. 31. The opinion is given by Mr. Justice Ellsworth. He gives in a very succinct view an exact description of a modern policy of insurance. I quote:

"The contract of insurance, as all know, is a contract of indemnity, upon the terms and conditions specified in the policy of insurance. It is a peculiar contract—and one of hazard purely. The insurer undertakes, for a comparatively small premium, to guarantee the insured against loss or damage, upon the exact terms and conditions agreed on, and upon no other. The party called upon to pay in case of loss, may therefore justly insist upon the fulfillment of these terms; and if the plaintiffs can now bring themselves, fairly, within the conditions of the policy, as they insist they can, they are entitled to recover for the loss; but if they can not, then they must admit they can not recover; however well meaning and upright, and however confident in their view of the terms and conditions of the policy. We may not *make* a new contract for the parties; but rather it is our duty to enforce and carry out one already made."

The word *make* is underscored in the opinion. This is in a very few words a very accurate statement of the law of insurance as known under modern policies, and is being followed generally by the highest courts in this country.

The Supreme Court of Ohio, in the case of *Little* v. *Insurance Co.*, follows this decision of Mr. Justice Ellsworth, and I quote from that case:

"The contract of insurance is a contract of indemnity upon the terms and conditions specified in the policy. The insurer undertakes, for comparatively small premium, which good faith requires should be paid, to guarantee against loss or damage upon the terms and conditions agreed upon, and upon none other. He may, therefore,

justly insist upon the fulfillment of those terms. We can not make a new contract for the parties. Good faith is the life breath of the contract." (38 Ohio St. 117).

And in a still later case in New York, that of *Dwight, et al.* v. *Germania Life Ins. Co.*, 103 N. Y. 359, the court say:

"Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein, as they may mutually agree upon, or which they may consider necessary and proper to protect their interests, and which when made, must be construed and enforced like all other contracts, according to the expressed understanding and intent of the parties making them. If an insurance policy in plain and unambiguous language makes the observance of an apparently immaterial requirement, the condition of a valid contract, neither courts nor juries have the right to disregard it, or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties."

Very similar language is used by the House of Lords in *Shore* v. *Eilson*, 9 Clark & Fin. 565:

"The general rule I take to be, that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or to the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining in according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible."

Every one of any experience in this class of cases sees the full force of this in contracts of insurance.

The real question which arises in this case is whether the plaintiff in error assented to such an appraisement or arbitration as the policy provides for, or whether his assent

was in such terms as to amount to a refusal of the appraisement provided for in the policy.

The plaintiff in error, contends that the appraisement or arbitration is one to be conducted by a regular trial, in which the parties have each the right to give in evidence any and all competent evidence. The defendant contends that it is a domestic tribunal of competent and disinterested persons selected by the parties. Indeed, the plaintiff claimed the right, which he never abandoned, to sell all the property, even that in unopened hogsheads, at auction as damaged property, and to offer that sale in evidence to the appraisers, though that course would deprive the defendants of their right to take the property at the appraised value. The policy provided for a submission to competent and impartial persons. This, both parties understood to mean, persons familiar with the manufacture of tobacco. This is well expressed by Mr. Kittredge in his letter of the 29th of April.

He says:

"But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award."

(See his letter of that date, printed matter, pp. 15–18.

The case, therefore, as to the conduct of the hearing before the appraisers or arbitrators, falls strictly under the rule stated in Russell, and in Morse.

Russell on Awards p. 194.

Morse on Arbitration p. 142.

Eads v. *Williams*, 4 DeGex, McN. & G. 687.

Calidonia R. W. Co. v. *Lockhart*, 3 Macq. H. L. 823.

Johnston v. *Cheape*, 5 Dow, 264, 263.

Hager v. *Baker*, 14 M. & W. 9.

Bottomley v. *Ambler*, 26 Weekly Reporter, 566.

Bottomley v. *Ambler*, 38 Law Times, N. S. 546.

Hall v. *Norfolk Ins. Co.*, 57 Conn. 117.

In *Eads* v. *Williams*, Cransworth, Lord Ch., says:

"As to the objections, there is no doubt that if they were made in good time the result is fatal to the award. I do not, however, agree in the suggestion, that it was incumbent on the referees to examine witnesses. I do not think, when a matter is refered to surveyors or other persons of skill, to fix the value of property to be bought or let, that the meaning is that they are necessarily to examine witnesses; they are intrusted from their experience and observation to form a judgment which the parties referring to them agree shall be considered satisfactory. I do not, therefore, think that in the present case it is an objection that the referee did not examine witnesses, provided they bona fide meant to say that they knew enough of the subject to decide properly without doing so." 4 De Gex McN. & G. 687.

In *Calidonia R. W. Co.* v. *Lockhart*, Lord Wensleydale says:

"An arbitrator is not to examine witnesses, and can not by the law of England insist upon their being examined on oath unless the submission provides for it. By the 31st section of the above mentioned act he may, but is not bound to, examine the parties and their witnesses on oath; nor is he prevented from consulting men of science in every department where it becomes necessary." 3 Macq. 823.

In *Johnson* v. *Cheape*, Lord Eldon says:

"An arbitrator is not bound in all cases to receive evidence, whether it will have any effect on his mind or not." 5 Dow, 264.

In *Bottomley* v. *Ambler*, 26 Weekly Reporter, 566, the Court of Appeal reversed the Master of Rolls (James Baggallay, and Thesiger, L. JJ.) as follows:

"The court (James, Baggallay and Thesiger, L. JJ.) were of opinion that, as the arbitrators and the umpire were all skilled men, and acquainted with the value of property, similar to that which was the subject-matter of the abitration, there was no evidence which could have been brought forward usefully to instruct the mind of the umpire, and being also of opinion that a formal arbitration, conducted in the usual way, with the expense of counsel, solicitors, and witnesses, was not contemplated by the parties, held that the award must stand."

In *Hall* v. *Norwalk Fire Ins. Co.*, 57 Conn. 117, the court say:

"In the first place, arbitrators are not forced to follow strict rules of law, unless it be a condition of the submission that they shall do so. See *Remlee* v. *Hall*, 31 Verm. 583, and the cases cited under the next proposition.

If arbitrators have acted in good faith, neither party will be permitted to avoid the award by showing that they erred in judgment, either respecting the facts or respecting the law where the submission does not require them to follow the law. 6 Waits Actions and Defenses, 553; *Merritt* v. *Merritt*, 11 Ill. 565; *Moore* v. *Barnett*, 17 Ind. 349; *Fudickar* v. *Guardian Life Ins. Co.*, 62 N. Y. 392; *Boston Water Power Co.* v. *Gray*, 6 Met. 131.

Again, if, as is directly found in this case, persons are selected arbitrators by reason of special knowledge or skill possessed by them with reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information, investigation and judgment, they may even be justified in refusing altogether to hear evidence. Morse on Arbitration and Award, 143; *Wiberly* v. *Matthews*, 91 N. Y. 648; *Eads* v. *Williams*, 24 L. J., Ch. 531; *Caledonia Railway Co.* v. *Lockhart*, 3 Macq. 808; *Johnstone* v. *Cheape*, 5 Dow, 247."

And an award thus made is good, unless fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, is shown.

Fletcher v. *N. O. & N. E. R. Co.*, 19 Fed. R. 731-2.
Kihlberg v. *United States*, 97 U. S. 402.
Hudson v. *McCartney*, 33 Wis. 331.
Gauche v. *Lon. & Lanc. Ins. Co.*, 4 Woods, 113.
Gauche v. *Lon. & Lanc. Ins. Co.*, 10 Fed. Rep. 355.
Perkins v. *U. S. Electric Light Co.*, 16 Fed. R. 515.
Elliott v. *Royal Ex. Ins. Co.*, L. R. 2 Ex. 244.
The United States v. *Robeson*, 9 Peters, 327.
Herrick v. *Belknap's Est., etc.*, 25 Vt. 681.
Hood v. *Hartshorn, Admr.*, 100 Mass. 121.
Brown v. *Overbury*, 11 Excheq. 615.
Livingston v. *Ralli*, 5 Ellis & Black. 134,
Tredwen v. *Holman*, 1 Hurl. & Colt. 80.
Commercial Ins. Co. v. *Robinson*, 64 Ill. 271.

THE CLAUSE FOR APPRAISEMENT OR ARBITRATION IS VALID.

Avery v. *Scott*, 5 House of Lords, 811.
Livingston v. *Ralli*, 5 Ellis & Black, 131.
Elliot v. *The Royal Ex. Ass'n, Co.*, 11 Exch. B. and R. 224.
Tredwen v. *Holman*, 1 Hurls & Colt, 80.
Bramstein v. *Accidental Death Co.*, 1 Best & Smith, 782
Viney v. *Bignold*, 20 Queens Bench D. W. 174.
Prest., etc., Canal Co. v. *Pa. Coal Co.*, 258–9.
Liverpool, London and Globe Ins. Co. v. *Wolff*, 50 N. J. Law, 453.
Adams v. *Ins. Co.*, 70 Cal. 198.
Carroll v. *Ins. Co.*, 72 Cal. 301.
Carroll v. *Girard Fire Ins. Co.*, Sup. Ct. California, 13 Pac. Rep. 863.
Chippewa Lumber Co. v. *Phœnix Ins. Co.*, Sup. Ct. Michigan, April 11, 1890, 44 N. W. Rep. 1055.
Hall v. *Norwalk Fire Ins. Co.*, 57 Conn. 114.
Gasser v. *Sun Fire Office*, 19 Ins. L. J. 243.

See also cases above cited.

The early doctrine upon this subject was upon a very different class of cases, and upon a general reference of all matter in dispute.

Thomson v. *Charnock*, 8 T. R. 139, is one of the cases to which reference is more generally had, and shows the arbitration referred to and which was generally declared void as ousting the jurisdiction of the courts.

"In case any difference should arise between the parties touching the agreement or any thing relating thereto, the same should be settled and adjusted by three arbitrators to be chosen, etc." (8 T. R. 139.)

The decision of the court, by Lord Kenyon, is very short, and I quote it all, as follows:

"It is not necessary now to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law, or equity of their jurisdiction. (8 T. R. 140.)

In cases of this character, where all matters relating to the agreement are referred, the cases generally declare the same to be void, as denying the jurisdiction of the court. This doctrine in modern times, and as applied to particular contracts, is much narrowed. Even the general reference can not now in all cases be claimed to be illegal. Indeed, very distinguished modern judges, Lord Campbell and Ch. J. Coleridge, have expressed themselves in opposition to this doctrine as being inconsistent with the liberty of the subject.

The policy in question confines the arbitration to the ascertainment of the damages, and makes the award a condition precedent.

The contract in question is also one in reference to which there is a peculiar propriety in such a provision to prevent imposition and large expense and delay in the courts.

This question was very fully considered in the case of *Avery* v. *Scott*, 5 House of Lords 811.

I quote from opinion of Lord Campbell, pages 851–2, as follows:

"But what pretense can there be for saying that there is any thing contrary to public policy in allowing parties to contract that they shall not be liable to any action until their liability has been ascertained by domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract.

. . . . . .

Is there any thing contrary to public policy in saying that the company shall not be harassed by actions, the costs of which might be ruinous, but that any dispute that arises shall be referred to a domestic tribunal which may speedily and economically determine the dispute. I can see not the slightest ill consequences that can follow from such an agreement, and I see great advantage that may arise from it. Public policy therefore seems to me to require that effect should be given to the contract.

. . . . . .

Where an action is indispensable you can not oust the court of the jurisdiction over the subject, because justice can not be done without the exercise of that jurisdiction. That is all, and there can be no doubt about that. This is the foundation of the doctrine that the courts are not to be ousted of their jurisdiction."

"But I am glad to think that there is no case that I am aware of that will be overturned by your Lordship's affirming the judgment now in dispute. Because all that has been hitherto decided in *Thompson* v. *Charnock*, and the other cases referred to, is this, that if the contract between the parties simply contains a clause or covenant to refer to arbitration, and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. But there is no case that goes the length of saying, that where the contract is as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought although there has been no arbitration. Now, in this contract of

insurance, it is stipulated in the most express terms that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatever, and no cause of action accrues until the arbitrators have determined" (pp. 851–2–4).

Coleridge, J. (now Ch. J.), in his opinion, says:

"I certainly am not disposed to extend the operation of a rule which appears to me to have been founded on very narrow grounds, directly contrary to the spirt of later times, which leaves parties at full liberty to refer their disputes at pleasure to public or private tribunals. And I think the judgment of the Court of Exchequer Chamber stands on a safe distinction between an agreement which would close entirely the access to the courts of law, and that which only imposes as a condition precedent to the appeal to them, that the parties shall have first settled, by an agreed on mode, the precise amount to be recovered there" (p. 843).

Justice Crowder, in his opinion, touches one of the important considerations affecting this clause:

"But the premium was not paid by the plaintiff for such an absolute indemnity by defendant; and it may well be that a less sum by way of premium was demanded by the defendant, on the very ground that the contract of insurance was varied and modified by the 25th rule of the association. It is only a qualified contract of insurance, contravening no law, which the parties therefore were at liberty to enter into, and by which they must be bound" (p. 823).

In the case of *Livingston* v. *Ralli*, 5 Ellis & Black, Q. B., 131, which was an action for a breach of a contract to refer to arbitrators the clause in the contract relating to reference, is in the following words:

"And that, should any difference arise as to that contract, the same should be left to arbitration in London in the usual manner; that is to say, the arbitration of two London cornfactors, one to be chosen by plaintiff and the

other by defendant, or an umpire to be chosen by such arbitrators in case of differences."

In that case Lord Campbell, then Ch. J., uses the following emphatic language:

"But I can not bring myself to doubt that on principle an action lies on it. There is a sufficient consideration to support any promise; and there is an express promise to refer any disputes that may arise. Why should not such a promise be binding, and one for the breach of which an action should lie? Can it be said that such an agreement is void as being immoral, or as contrary to public policy? It seems to me, on the contrary, that it is a very judicious and proper arrangement, and that it would be a strange restriction on the liberty of the subject, if parties could not make such an agreement if they pleased." (5 El. & Bl. 135.)

Lord Coleridge says (p. 137):

"And several cases besides *Tattersall* v. *Groote* are mentioned, in which the doubt has been referred to. But there never has been a decision; and, therefore, we must look to principle. Now the principle of *Thompson* v. *Charnock* (8 T. R. 139), which was cited in support of demurrer, really turns against it; for there it was decided that it was not possible, by agreeing on a domestic forum, to oust the courts of their jurisdiction. Here we are asked to oust the domestic forum of all its jurisdiction. The fallacy of the argument consists in confounding two separate cases; one where the defendant relies on such an agreement as a bar to an action—a defense which, if successful, would oust the court of jurisdiction; the other, which is the present case, where the plaintiff seeks damages for not fulfilling the agreement."

Erle, J.:

"I am of the same opinion, and have very little to add. The agreement to refer prospective differences is not illegal in itself. In *Tattersall* v. *Groote*, it would appear that Lord Eldon rather inclined to think it was illegal; but I think it is an important principle of law that parties are at liberty to make what contracts they please, so that they stipulate to do nothing but what they are at liberty

to do. It is clear that the parties may lawfully and bindingly refer; and that they may lawfully and bindingly agree to refer a dispute which has already arisen. It seems to me that they may lawfully and bindingly agree to refer such disputes when they shall arise." (5 El. & Bl. 137.)

In the case of *Elliott* v. *The Royal Ex. As. Co.* (II Exch., B. L. R., 224), is the following:

Martin, B. "In construing the contract, we must consider what is its nature. It is a policy of insurance, and it is well known to every one, that, on such a contract, there is constantly a dispute as to the value of the articles for which compensation is claimed. It is equally well known that this is a question which a jury can not try, and that if the matter is allowed to go into court, the parties, after incurring all that expense, may have to go to arbitration. Therefore, assuming the parties to be aware of this, it is the part of wise men to agree that the question of value shall be so determined at the outset. Now, the first stipulation is, that the assured shall, within fifteen days, send in a particular account of his loss. It seems to me that this is clearly a condition precedent, and it was so decided in *Roper* v. *Lendon*, (1). The article then provides for the payment of the money after it has been adjusted, but reserves to the company an option of reinstating or rebuilding; so that we have two provisions, both of which are in the nature of conditions precedent, and there then follows a provision, that in case any difference shall arise, it shall be submitted to arbitration; and the question is, whether this is of the same character as the others. Treating the question merely as a matter of construction of words themselves, I do not think the matter quite clear; but, taken in connection with the context, they may well bear the meaning contended for by the defendants." (II Exch. 244–5.)

To the same effect, is the opinion of the Court given by Martin, B., in *Tredwen* v. *Holman*, 1 Huls. & Colt, 80.

A very full discussion of this question is to be found in the opinion of the court in the case of *Pres't, etc., Canal Co.* v. *Pa. Coal Co.*, 50 N. Y. Rep. 258–9.

After stating the regular rules as to agreement, the court say:

"The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms, and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases, unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions, is to narrow, rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified."

In the case of *Commercial Insurance Co.* v. *Robinson*, 64 Ill. 271, the court say:

"It is urged that the stipulations of the policy were not complied with in regard to an appraisement. An inventory of the goods burned or injured was furnished to the company. They expressed their dissatisfaction with it, and might have insisted on the appointment of appraisers. They made no offer to have them appointed, and it was not incumbent on the appellee to move further in the matter. He did what the policy required him to do when he furnished the inventory."

This state of the law is well put by J. Wallace, of the Circuit Court of the United States, for the Southern District of New York. He says:

"It is familiar doctrine, that a simple agreement inserted in a contract, that the parties will refer any dispute arising thereunder, to arbitration, will not oust courts of law of their ordinary jurisdiction. Either party may sue the other upon the contract, without having offered to arbitrate. He may be liable for damages, or a breach of his agreement to arbitrate; but the agreement will not bar his suit. If, however, the contract stipulates, that the arbitration is tobe a condition precedent to the right to sue upon the contract, or if this may be inferred upon construction, no suit can be maintained, unless the plaintiff has made all reasonable effort to comply with the condition. But under

the agreement here there is no cause of action upon the facts as they exist. The agreement, which creates the obligation of the defendant, provides the mode by which the extent of the obligation is to be ascertained." (16 Fed. Rep. 515.)

This question is fully considered in *Gauche v. Lon. and Lancashire Ins. Co.*, 10 Fed. Rep. 355, by Billings, D. J.

"It has been urged that this stipulation is void, as being against the policy of the law, in that it withdraws the questions from the courts. I think the weight of authority is decidedly in favor of the conclusion, that parties may legally, by their own agreement, refer the amount of damages under a contract, to arbitrators, and by a proper covenant, withdraw that one question from the courts. *Scott* v. *Avery*, 5 H. of L. Cas. 811. This was decided in 1865, and that decision has been, so far as I can ascertain, acquiesced in both Great Britain and in this country. The cases which seem to conflict with this case, are those which were, or were thought to be, distinguishable from it. The doctrine there established has not been doubted. The cases to which I have been referred, which were construed to be opposed to it, are where there was no covenant not to sue until an award, but merely a covenant to refer."

This case is also reported in 4 Woods, 113.

But the Supreme Court of the United States has put this matter at rest in the case of *Hihlberg* v. *United States*, 97 U. S., 401. Speaking of the agreement, the Court say:

"The parties, however, concerned in designating a particular person—the chief quartermaster of the district of New Mexico—with power not simply to ascertain, but to fix, the distances which should govern in the settlement of the contractor's accounts for transportation. . . . "

And further:

"Indeed, it is not at all certain that the government would have given its consent to any authority which did

not confer upon one of its officers the authority in question. If the contract had not provided distinctly, and in advancement of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive, and to the contractor oftentimes ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the chief quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the goverument. The contract being free from ambiguity, no exposition is allowable to the express words of the instrument."

See also *United States* v. *Robeson*, 9 Peters, 327.

Martin v. P R R Co v March 114 U.S. 549

The case of *Viney* v. *Bignold*, 20 Q. B. Div. 174, is a late English case, and was an action brought on a policy of fire insurance in which a similar clause requiring an arbitration was passed on by the court. On page 174, Wills, J., in giving the opinion of the court, says:

"The question to be decided is, what is the meaning of this provision. I am of opinion that it means that in case of difference, the amount to be paid shall be determined by arbitration, and until this is done no liability shall arise. In short the condition means what it says." . . . "This appears to be the reasonable construction of the policy, but it is necessary to consider whether there is any authority against this view. I can not find any such authority, and I do not think that any of the cases cited in the argument are inconsistent with this construction."

Grantham, Judge, says:

"I am of the same opinion, and I think that all the authorities are opposed to the contention put forth on behalf of the plaintiff."

In the case of *Hall* v. *The Norfolk Fire Insurance Co.*,

57 Conn., Rep. 106, decided by that court in 1889, they say, on page 114:

"If parties make an arbitration which has the effect to oust the courts of jurisdiction, it is held to be invalid (although more recent decisions question whether this doctrine is sound in principle), but it has always been held, both by the courts of England and of the United States, that arbitrations to settle particular questions which are auxiliary to the jurisdictions of courts, such as the amount of damages or the amount of the loss by fire under the policies of insurance, are binding in law, and indeed highly favored by courts."

The case of the *Liverpool & London & Globe Insurance Co.* v. *Wolf*, 50 New Jersey Law, 543, was with reference to the same clause in controversy in this case. Ch. J. Beasley, in giving the opinion of the court, says:

"Such an agreement is both legal and reasonable and it is not perceived that any authority exists which holds a contrary doctrine."

The latest case that I have seen is that of the *Chippewa Lumber Co.* v. *The Phoenix Insurance Co.*, 44 North-western Rep. 1055, decided on the 11th of April, 1890, by the Supreme Court of Michigan. This was an insurance case in which the clause was quite similar to the one in controversy. The court say;

"Courts must interpret and give effect to contracts according to the clear intent of the parties as expressed in the writings they have deliberately executed." . . . "Applying this rule we find no difficulty in determining upon what the minds of the parties met in making this contract of insurance. They agreed to submit the amount of loss or damage to arbitration, that it should be payable only after it had been so ascertained; that such arbitration should be a condition precedent to bringing suit, and that in the event of loss the measures of damages should in no case exceed the actual costs of producing the property destroyed. No other construction can be seriously contended

for. There is no vagueness, uncertainty or ambiguity in the terms of the policy." . . . "We hold the agreement reasonable and legal. It is sustained by the clear weight of authority."

And here the court cite a large number of authorities.

There is another class of cases that bear upon this question:

First. The cases finally establishing the one year clause in all policies of insurance. This clause was held to be invalid as against the policy of the statute of limitations by Judge McLean.

French v. *LaFayette Ins. Co.*, 5 McLean, 463.

Judge Nelson about the same time held the clause to be a condition intended to reach and regulate the rights of parties.

Gray v. *Hartford Fire Ins. Co.*, 1 Blatch. 288–9.

In this case the court (Nelson, J.), says:

"The bringing of the suit within this period is made a condition subsequent to the right of the insured to recover the loss. The policy was entered into, and the risk assumed with express reference to this, among other conditions; all which must, therefore, be regarded in expounding the rights and obligations of the parties under the contract. It stands upon the footing of the other conditions to be found therein; such as giving notice of the loss, delivering a particular account of the same, properly verified, producing books of account, etc. It is not against law, nor repugnant, nor impossible, and may be very material to the rights and interests of the party in whose favor it was made."

Further on the court say:

"But the true ground, we are inclined to think, upon which the clause rests and is maintainable, is, that by the contract of the parties, the right to indemnity in case of loss, and the liability of the company therefor, do not become absolute, unless the remedy is sought within the

year. The stipulation goes to the right as well as the remedy. Indeed the time within which the remedy is to be enforced is prescribed for the purpose of reaching and regulating the rights of the insured under the contract. Although the condition is subsequent, it is, if lawful, as operative and binding as a condition precedent; and that it is lawful, as well as a very essential part of the contract, we can not doubt.

The clause contemplates a loss about which a controversy may arise between the insured and the company, and in respect to which the right to indemnity may be denied. The object was not to foreclose it and prevent a resort to the proper tribunal, but to compel a speady resort, and a termination of the controversy, while the facts were fresh in the recollection of the parties and witnesses, and the proofs accessible.

While it is not perceived to be at all injurious to the rights of the insured, it is manifestly beneficial to the company, who stand on the defensive and are obliged to await the movements of the adversary party" (pp. 288-9).

The doctrine thus expressed by Judge Nelson has since received the general assent of the courts of this country and of England.

Riddlesberger v. *Hartf. Ins. Co.*, 7 Wal. 390-1.

Express Company v. *Caldwell*, 21 Md. 369.

In *Riddlesberger* v. *Hartf. Ins. Co.*, the court, on page 391, says:

"The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause can not alter the case. The contract declares that an action shall not be sustained, unless such action, not some previous action, shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court can not insert one without changing the contract."

In *Express Co.* v. *Caldwell*, 21 Wall. 369, the court held that an express contract requiring the company to present

those matters in which he may, to some extent, be said to decide judicially, I consider that there he was the known officer of the company, and his decision as such was accepted. He is not named personally as Mr. Brunel, but as 'the principal engineer for the time being;' whatever principal engineer the company appoints is to give certificates and to make payments. Nay, moreover, he is to decide, as it were, upon appeal from the assistant or resident engineer, for it is provided that the resident engineer differing with the contractor upon any of these matters, the principal engineer is to decide. Then, was it not known to the contractor that Mr. Brunel was the principal engineer of the company, was largely interested on the side of the respondents as their paid servant, and largely profiting by his connection with them? Was it not known that he might hold shares in the company?" (5 H. of L. 115.)

These different changes have been made to meet the necessities of different contracts as they arise. A couple of lines in the case of *Express Co.* v. *Caldwell*, expresses the view of the court upon this point and shows how little weight such a case as *Thompson* v. *Charnock*, 8 T. R. 139, decided by Lord Kenyon, can have upon a contract of the character in question.

The court (Strong, J.), in delivering the opinion, says:

"But that which was public policy a hundred years ago has undergone changes in the progress of material and social civilization." (21 Wal. 267).

This is quite applicable to the question now before the court and to the point, that the contract is illegal because it ousts the jurisdiction of the court. When insurance was confined to narrower risks, the policy was said by C. J. Platt to be "a crude and incoherent document."

The moral risk (now the greatest of all risks), was then small, but when fire insurance became so common, it was found that the moral was the greatest of all the risks. When business was dull and unprofitable, fires became

common, and when it was ascertained that juries generally decided for the insured party and gave the largest amount; and when it was further ascertained that parties having the entire custody and care of the goods could so arrange them after their destruction as to recover a very extravagant value and obtain a very large sum for a very small premium, it was apparent that the temptation to fraud was so great that it was necessary to surround the contract by the conditions and stipulations in question, and to make the payment one "upon the conditions and terms of the policy."

The contract, as the Supreme Court of Connecticut has declared, is a complicated contract. The question of the adjustment of losses is one peculiarly fitted for competent arbitrators acquainted with the business, and is not at all fitted for a jury, as is stated by Mr. Justice Martin in *Elliott* v. *Royal Ex. Asso. Co.*, 2 Exch. L. R. 244–5.

There is no question in this case of ambiguous or equivocal language requiring a construction more strongly against the insurer. The condition of the policy is plain and there can be no doubt as to its meaning. It was not intended that it should be frittered away by shrewd correspondence, and terms and conditions forced into it not originally contemplated or thought of by the parties, or intended by the condition. The contract is one which required the highest good faith. It is a contract of hazard, the only one sustained in law. It is surrounded by many temptations to fraud, requiring special provisions to protect the underwriter.

It is therefore quite proper and reasonable that the company should provide for an appraisement by competent and impartial persons, one to be chosen by each party, and in case of disagreement they to select a third party, as to the amount of any loss or damage, if at any

time differences should arise on account thereof, the same to be made at the written request of either party to the contract. These appraisers would naturally be familiar with the business, and could call in such evidence as they might need to give them the fullest information.

In what way could the question of loss or damage be more fairly adjusted with reference to either party to the contract? It was expressly stipulated in the policy that the insurance against loss or damage by fire should be subject to the conditions and stipulations of the policy, which constitute the basis of the insurance, and that the loss should not be payable until such appraisement was made, and that no suit or action should be brought against the company under the policy until after such award shall have been obtained, fixing the amount of such claim in the manner therein provided, thereby making the ascertainment of the loss or damage in this way a condition precedent to any right of action accruing under the policy.

We submit that it is a case where the courts should uphold and enforce such an agreement, and that there is no error in the record which should cause a reversal of the judgment.

The foregoing was largely written by my partner, Mr. T. D. Lincoln, just before his death. He argued the case in the Circuit Court, and this brief has been prepared largely from his brief in that court, with a portion written for this court just before his death. It has been prepared under difficulties. Respectfully submitted,

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